United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7465

United States Court of Appeals
For the Second Circuit

DOCKET No. 76-7465

TRANSCONTINENTAL OIL CORPORATION, TRECON OIL CO. LTD. and B. EDWIN SACKETT, individually and as nominee,

Plaintiffs-Appellees and Cross-Appellants,

—against—

TRENTON PRODUCTS COMPANY, BERNARD FEIN, HERZFELD & STERN, LOEB, RHOADES & CO., GERSTLEY, SUNSTEIN & COMPANY, A. ARTHUR WEISS, LOUIS C. FIELAND and THERESA ZAPPLEY,

Defendants.

TRENTON PRODUCTS COMPANY and BERNARD FEIN,

Defendants-Appellants and Cross-Appellees.

TRENTON PRODUCTS COMPANY and BERNARD FEIN,

Defendants and Third-Party Plaintiffs—Appellants and Cross-Appellees,

—against—

PHILIP P. GOODKIN, LOUIS GOODKIN, MICHAEL A. ROBERTS, DAVID FRANKEL, JAMES E. DAVIS, PAUL A. ROSSBOROUGH, J. STREICHER & COMPANY, HARRY B. LESLIE, BERTRAM F. FAGENSON, EDWIN B. SACKETT and FAGENSON AND FRANKEL COMPANY, INCORPORATED,

Additional Defendants—Appellees on Counterclaim.

Appeal from a Judgment of the United States District Court for the Southern District of New York

UNITED STATES COURT OF APPEALS
FILED
DEC 6 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX—PROCEEDINGS BELOW
Volume I of III
Pages 1 to 162

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[redacted]

UNITED STATES DISTRICT COURT

Jury demand date:

JUDGE CONNER

TITLE OF CASE	ATTORNEYS
CONTINENTAL OIL CORPORATION,	For plaintiff:
CONTINENTAL OIL CO. LTD. AND	Kaufman, Taylor, Kimmel & Miller
H. EDWIN SACKETT, INDIVIDUALLY AND AS NOMINEE	41 East 42 St. N. Y. 10017
	MU 2-2983
VS	
TRENTON PRODUCTS COMPANY, - Dismissed 8-30-68	
BERNARD FEIN.	
HERZFELD & STERN,	
LOEB, RHOADES & CO.	
GERSTLEY, SUNSTEIN & COMPANY,	
M. ARTHUR WEISS	
LOUIS C. FIELAND AND	
THERESA ZAPPLEY	
Edwin B. Sackett (added in 3rd pty.counterclaim)	
Phillip P. Goodkin (8-15-68 added defts.)	
Louis Goodkin	
Michael A. Roberts,	
David Frankel	For defendant:
James E. David	Louis C. Fieland (pro se)
Paul A. Rossborough	295 Madison Ave. 10017
J. Streicher & Company	
Harry B. Leslie	Stroock & Stroock & Lavan (defts.Trenton Prc
Bertram F. Fagenson and Fagenson and	61 Broadway, NYC (Fein & Zappley)
Frankel Company, Incorporated	Frank Feinfield
	Kaufman, Taylor, Kimmel & Miller (add'
	41 East 42nd Street NYC 10017 deft
	MU 2-2983

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	2-7-67	Kaufman	15 —	
		2-7-67	USTREAS		15 —
J.S. 6 mailed	Marshal	9-2-75	Kaufman	5 —	
		9-2-75	Treas		5 —
Basis of Action: VIOLATION OF SECURITIES EXCHANGE ACT OF 1933	Docket fee	9-4-75	Blackman	5 —	
		9/7/75	Treas		5 —
	Witness fees				
Action arose at:	Depositions				

UNITED STATES COURT OF APPEALS
FILED
OCT 28 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BEST COPY AVAILABLE

JUDGE CONNER

DATE	PROCEEDINGS	Date Order Judgment N
[illegible]9-67	Filed complaint and issued summons	
[illegible]. 22-67	Filed summons & return, served defts. Trenton Products Co. & Bernard Fine by Bernard Fine 3-7-67	
Mar.3-67	Filed Notice of Deposition.	
Mar 4-67	Filed stip. & order extending time of defts.(Trenton Porducts, et al.) to answer to 4-17-67.-Herlands,J.	
Mar 12-67	Filed stip. & order extending time of defts.(Trenton Products, et al.) to answer to 5-5-67.-Herlands,J.	
[illegible]y 9-67	Filed additional summons & return, served Louis C. Fieland personally 4-28-67	
May 11-67	Filed defts'(Trenton Products, et al.) affdvt. & notice of motion to dismiss-ret. 5-23-67	
May 11-67	Filed defts' memorandum in support of their motion	
May 19-67	Filed ANSWER.	LCF
May 22-67	Filed stipulation adjourning motion now ret. 5/23/67 to 6/13/67.	
June 7-67	Filed pltffs' memorandum in opposition to motion to dismiss(filed in court)	
June 9-67	Filed defts' reply memorandum in support of motion (filed in court)	
[illegible]8-67	Memo endorsed on motion filed 5-11-67-Motion denied. See opinion of this date filed herewith-Palmieri,J.	
July 18-67	Filed Opinion #33,836--Defts' motions are in all respects denied. It is so ordered--Palmieri,J.-mailed notice	
July 27-67	Filed deft's affdvt & notice of motion to resettle order ret 8-1-67	
July 27-67	Filed deft's memorandum in support of settling order	
July 28-67	Filed defts Trenton Products ANSWER	SS&L
July 31-67	Filed ANSWER of deft. to complaint (Theresa Zappley)	SS&L
July 31-67	Filed deft Trenton Product's notice of deposition of pltff	
Aug 1-67	Filed stip & order adjourning motion to resettle order to 8-8-67	
Aug. 9-67	Filed memo endorsed on motion to resettle order filed 7-27-67-Motion denied. See opinion of this date filed herewith--Palmieri,J.	
Aug. 9-67	Filed memorandum O #33,932--Motion to resettle order of this court entered 7-18-67 is deni[illegible] is so ordered--Palmieri,J.-mailed notice	
Aug. 24-67	Filed pltffs' REPLY counterclaim of defts. Trenton Products & B.Fein	
Sept 7-67	Filed deft's notice of taking deposition	
Sept 15-67	Filed defts. notice of taking deposition, sup. issued	
Feb. 29-67	Filed plaintiff's notice of taking deposition	
Feb. 23-68	Filed affidavit and notice of motion of defts. Trenton Products Company, et al to serve and file an amended answer, ret. 3-5-68	
Mar. 4-68	Filed stip. adjourning motion ret. 3-5-68 to 4-9-68	
Mar. 8-68	Filed stip. adjourning motion ret. 4-9-68 to 5-7-68	
May 23-68	Filed Defts. Memorandum of Law in Support of Motion ret. 5-28-68	
May 29-68	Filed Memo End. on motion filed February 23, 1968 - This motion is marked off. So ordered - McLean, J. m/n	
June 13-68	Filed Defts. Trenton Prod. Co. Notice of Motion ret. July 23, 1968 10 A.M. File Amended Answer.	
June 13-68	Filed Defts. Memorandum of Law in Support of Motion	
Jul 19-68	Filed Pltffs. Notice of Deposition of Milton Paulson	
Jul 24-68	Filed Memo endorsed on Motion filed June 13, 1968 - Motion granted no opposition settle order on notice - Mansfield, J.	
Aug 15-68	Filed Notice of Settlement ret. 8-6-68 10 A.M	
Aug 15-68	Filed Order - ordered that defts. Trenton Prods. Co. and Bernard Fein are given leave to serve and file an amended answer. Ordered that Phillip P. Goodkin, Louis Goodkin, Michael A. Roberts, David Frankel, James E. David, Paul A. Rossborough, J.Streicher & Co. Harry B. Leslie, Bertram F. Fagenson and Fagenson and Frankel Company Incorporated be made defts. to the third counterclaim contained in the amended answer of defts. Trenton Prods. Co. and Bernard Fein and that a summons be served upon them together with copy of said amended answer. Mansfield, J. m/n	

Civil Docket Continuation

DATE	PROCEEDINGS	Date Ord Judgment
Sep.4-68	Filed Pltffs. Notice of Deposition - subpoena issued	
Feb 4-68	Filed Deft and 3rd party pltffs. Amended Answer and Counterclaims Summons issued	
pt.23-68	Filed summons and return -served as follows:	
	P.P.Goodkin - 1 Chase Man.Plaza-9-9-68 - not served - Amend.Ans.	
	Dr.Louis Goodkin - personally -35 E.35th St., 9-11-68-& counterclm.	
	David Frankel - personally - 140 Bway. - 9-13-68-summons & complt.	
	J.Strucker & Co. -Mr. Schwerin -19 Rector St.,NY-9-11-68-summ.&compl	
	Bertnam F.Fagenson- Mr. L. Schreiben -76 Beaver St., 9-9-68-summons compl.	
	Fagenson & Frankel Co.,Inc.-Mr.Lewis Schreiber-76Beaver St.9-9-68 summons and complaint.	
	Paul A. Rossborough-Paul A. Rossborough(3376 W.137 St.) 3425 Service Rd. Cleveland,Ohio, 9-27-68 -summons & Amen.Answer and counterclaim	
	Michal A. Roberts- his wife -6301d Pond Rd.,Great Neck-9-16-68 summons and complaint	
	James E. Davis - did not serve - 9-19-68	
	Harry B. Leslie - his wife -15 Martin Court-Kings Point,N.Y. 9-16-68 - summons and complaint	
68.16-68	Filed REPLY of additional defts to counterclaim.	KTK3-1
eb.16-68	Filed REPLY of pltffs.Transcontinental Oil and B.Edwin Sackett.	KTK&J
eb.17-69	Filed pltffs' notices of taking deposision upon writeen interrogs.	
pr.1-69	Filed pltffs' notice of taking deposition upon written interrogs of Arthur A. Desilets.	
pr.1-69	Filed pltffs' interrogs. to Burton L.Palmatier.	
pr.1-69	Filed pltff's interrogs. to Arthur A. Desilets.	
pr.16-69	Filed pltff's NOTE OF ISSUE and statement of readiness.	
pr.25-69	Filed defts.& Third party pltff's objections to NOTE OF ISSUE.	
ay 5-69	Filed pltffs.and additional defts.on counterclaim affidavit and notice of motion to terminate examination, ret. 5-15-69.	
ay 12-69	Filed deft Trenton Products and B.Fein notice to take deposition of Philip Goodkin,Louis Goodkin,Michael A. Roberts,David Frankel,James E. Davis,Paul A.Rossborough,J.Streicher & Co., and Bertram F.Fagenson.	
ay 12-69	Filed affidavit of Irwin M.Taylor pursuant to rule 9(f)	
ay 14-69	Filed affidavit of Gerald D. Fischer in opposition to motion.	
May 16-69	Filed memo.endorsed on motion filed 5-5-69--Pltffs' and addt'l defts. on counterclaim motion for an order terminating the taking of depositions by the defts.Trenton Products Co. and Bernard Fein is denied,but on condition that the depositions of the additional defts. on counterclaim be conlcuded on or before June 2,1969. This is an order. No settlement is necessary---Murphy, J. m/n	
un.17-69	Filed memo.endorsed on Note of issue--Obj.overruled.So Ordered--McGohey, J.	
-17-69	Pre-Trial - McGohey, J.	
ul.15-69	Filed Louis Fieland,Pro Se- affidavit & Notice of Motion to Dismiss as to deft. Fieland- ret. 7-29-69	
ul.15-69	Filed deft.Fieland's memorandum in support of motion to dismiss.	
Jul.28-69	Filed stip. adjourning deft's (Fieland) motion to 8-5-69.	
Aug.4-69	Filed memorandum of law of Transcontinental Oil Corp. in opposition.	
ug.4-69	Filed affidavit of Irwin M. Taylor in opposition.	
ug.5-69	Filed reply affidavit of Theodore L. Marks .(Filed in Court)	
ug.6-69	Filed Memo Endorsed on deft.Fieland's motion to dismiss as to Fieland- filed 7-15-69--Motion denied following argument.-So ordered-Tenney,J.	
.11-69	Filed order pursuant to calendar rules 6 & 13. Sugarman,CH.J.	

Cont'd on page #3

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JUDGE CONNER Page 7

DATE	PROCEEDINGS	Date O Judgment
Dec 22-69	Filed pltff's designation of trial counsel.	
Dec 22-69	Filed deft's Louis C. Fieland notice designates himself as trial counsel.	
Dec 17-69	Filed defts designation of trial counsel	
June 24-70	Filed affdvt of Gerald Fischer (for defts') in opposition to pltff's motion to amend	
June 24-70	Filed pltff's affdvt & notice of motion to amend complaint	
June 24-70	Filed memo endorsed on motion filed this date---ℳ application granted on condition that motion be brought on within 3 weeks-So ordered-Bryan,J. m/n	
Jul 8-70	Filed pltffs' affidavit and notice of motion to amend complaint, ret. 7-21-70.	
Jul 13-70	Filed deft's (Louis C. Fielans affidavit,9(g) statement & notice of motion-summary judgement ret. 7-21-70.	
Jul 13-70	Filed deft's memorandum of law in support of his motion for summary judg. ret. 7-21-70.	
Jul 22-70	Filed memo endorsed on motion filed 7-8-70--Motion denied following argument, without prejudice to renewal at trial-So ordered-Bonsal,J.	
Jul 27-70	Filed memo endorsed on motion filed 7-13-70--Deft Fieland's motion for summary judgment is denied-So ordered-Bonsal,J. m/n	
Jul 15-70	~~Filed memorandum of law of pltff in opposition to motion for new trial~~ (in error)	
Jul 20-70	~~Filed brief in opposition to motion for new trial~~	
Jul 21-70	Filed memorandum of law of pltff Transcontinental Oil Corp. in opposition to motion for summary judgment	
Jul 21-70	Filed affdvt in Court of Gerald Fischer (defts') in opposition to pltff Transcontinenta application for leave to amend complaint	
Jul 21-70	Filed in Court statement of pltff Transcontinental Oil Corp. pursuant to Rule 9g	
Oct 15-70	Filed pltff's pre trial memorandum	
Oct 15-70	Filed deft Fieland's pre trial memorandum	
Oct 15-70	Filed defts' Trenton Products Co. & Bernard Fein's pre trial memorandum	
Oct 15-70	Filed consent pre trial order-Motley,J.	
Sep 26-72	Filed pltff's notice that Mr. Michaud will testify in place of Mr. Smith Re: Witness.	
Jan 21-74	Filed pltffs' notice to call the following witnesses: Abraham A. Buchman, Esq. and Joseph Lacona	
July 12-74	Pre-trial conference held- CONNER, J.	
Jul 30-74	Filed deft. Louis C. Fieland affdvt. and notice of motion for anorder granting leave for deft. Fieland to serve and file an amended answer adding a counterclaim against the pltffs. Ret. 8-9-74.	
Aug. 16-74	Filed pltffs' affdvt. of Irwin M. Taylor in opposition to application of deft. Louis C. Fieland, pro se, for an order granting him leave to serve and file a counterclaim.	
Aug. 30-74	Filed deft. Louis C. Fieland, pro se, reply affdvt. and in support of motion for an order granting leave to serve and file an amended answer.	
Aug. 30-74	Filed memo endorsed on motion filed 7-30-74. Motion denied. So ordered-CONNER, J. (m/n)	
Sep. 3-74	Filed defts. affdvt. and show cause order- that pltffs. show cause why an order should not be entered for summary judgment as indicated and for dismissal. Ret.9-10-74. CONNER, J.	
Sep. 3-74	Filed memorandum in support of defts' motion for separate trial of the issues of Res Judicata, release and statute of limitations.	
Sep. 3-74	Filed memorandum in support of defts' motion to dismiss pltffs' ninth and tenth alleged causes of action on the ground of lack of diversity jurisdiction.	
Sep. 3-74	Filed trial briefs of defts. Trenton Products Co. & Bernard Fein	
Sep. 3-74	Filed defts. Trenton Products Co. & Bernard Fein proposed findings of fact and conclusions of law.	
Sep 10-74	Filed defts' (Trenton & Fein) notice to take deposition of Transcontinental Oil Corp.	

(CONT'D - PAGE # 5)

...DOCKET (PAGE # 5) CONNER, J.

DATE	PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
Sep. 11-74	Before CONNER, J. non-Jury trial begun.	
Sep. 12-74	trial cont'd	
Sep. 16-74	trial cont'd	
Sep. 19-74	trial cont'd	
Sep. 23-74	trial cont'd	
Sep. 24-74	trial cont'd	
Sep. 25-74	trial cont'd	
Oct. 1-74	trial cont'd	
Oct. 7-74	trial cont'd	
Oct. 8-74	trial cont'd and concluded (10 days). Judge&s decision reserved.	
Nov. 18-74	Filed transcript of record of proceedings, dated 9-11,12, 16-1974	
Nov. 18-74	Filed transcript of record of proceedings, dated 9-19,23, 24, 25-1974 and 10-1-74	
Nov. 18-74	Filed transcript of record of proceedings, dated 10-7,8-1974	
Dec.23-74	Filed Post-Trial brief of deft. Fieland	
Jan. 23-75	Filed pltffs' Post-trial main brief.	
Jan. 23-75	Filed pltffs' post-trial main supplemental brief.	
Jan. 23-75	Filed pltffs' post-trial reply brief.	
Jan. 23-75	Filed pltffs' post-trial supplemental reply brief.	
Jan. 23-75	Filed pltffs' post-trial answering brief.	
Jan. 24-75	Filed reply brief of defts. Trenton Products Co. and Bernard Fein on their counterclaims.	
July 31-75	Filed Opinion # 42891 and Order-- immediately prior to the commencement of the trial, the third, fourth and eighth counts were withdrawn by pltffs' counsel and the sixth count was dismissed by the Court as res judicata. A motion to amend the complaint to allege an eleventh count was denied at the conclusion of the trial. The issue of liability under the first, second, fifth, seventh, ninth and tenth counts and the counterclaims was tried without a jury during Sept. and Oct. 1974. This Opinion incorporates the Court's findings of fact and conclusions of law pursuant to Rule 52 (a) FRCP. For the reasons stated-- Trans is entitled to recover from Fein its damages proximately resulting from his conversion of the Desilets shares, and the Syndicate is enti led to recover from Fein its damages stemming from his breach of warranty. The remainder of the claims asserted against Trenton, Fein and Fieland are dismissed, as are all three counterclaims interposed by Trenton and Fein. The parties will be contacted in due course to arrange a mutually convenient date fora hearing on the issue of damages. So ordered- CONNER, J. (m/n)	

(CONT'D — PAGE #6 — OTHER SIDE)

DATE	PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
ept. 2-75	Filed pltffs' notice of appeal from that part of the order entered on 7-31-75 which dismissed the First Count; so much of the Second Count as applied to deft. Fieland; the Fifth Count; the Ninth Count and the Tenth Count. Copies to: Gerald D. Fischer of Blackman, Lefrak, Moefson & Feld and Louis C. Fieland, Esq.	
ept.4-75	Filed cross-notice of Appeal by defts.Trenton Products Co. and Bernard Fein part of the Order dtd. 7-31-75 which imposed liability upon these defts.. Copies to Kaufman,Taylor,Kimmel & Miller, Louis C.Fieland.	
Nov. 7-75	PRE-TRIAL CONFERENCEHELD BY CONNER, J.	
)ec. 2-75	Filed pltffs' proposed findings of fact and conclusions of law with respect to damages affecting the so- called "Desilets Sahres" (To M.S.J.)	
)es. 8-75	Before CONNER, J. non-Jury trial begun and concluded (damages only). Judge s decision reserved.	
)2-09-76	Filed defts. Trenton Products Company and Bernard Fein post-trial memorandum on the issue of damages.	
6-25-76	Filed true copy of USCA order- that the appeal and cross-appeal are dismissed.	
-30-76	Filed Opinion # 44895-- for the reasons stated, Trans shall have judgment in that amount $ 48,200 plus interest as indicated. Submit judgment order on notice. CONNER, J. (m/n)	
)8-30-76	Filed Order and Judgment No. 76,795 that 1st,fifth,sixth,seventh & ninth coounts of complaint are dismissed that th rd,fourth,eighth and tenth co of complaint are withdrawn with prejudice that claims against deft Feila are dismissed with prejudice that pltff Transcontinental Oil Corporation judgment in its favor upon second court and that said pltff recover of d Bernard Fein sum of $48,200.00 ,etc. that counterclaims of defts Trenton Products Company and Bernard Fein are dismissed with prejudice and that all parties bear their own costs against the pltff Transcontinental Oil Corporation.CONNER,J JUDGMENT ENTERED ON: 8-31-76. m-n	
09-24-76	Filed Defts. Trenton Products Co. and Bernard Fein Notice of Appeal from the Order dated 08-26-76. Issued all copies.	
)-28-76	Filed Cross-Notice of Appeal of Pltffs to USCA 2nd Circuit from order of Hon. Conner entered 8-31-76,etc. Notices mailed to: Gerald D.Fisher,Esq. of Blackman Lefrak Myerson & Feld,424 Madison Ave.New York,NY 10017 and Louis C.Fieland,Esq. 919 Third Ave. N.Y.C.100	
09-29-76	Filed Supersedeas Bond undertaking on Appel in the sum of $85,977.00. Insurance Company of North America,Phila. Pa.	
10-28-76	Filed notice that the record on appeal has been certified and transmitt to the USCA on 10-28-76	
11-19-76	Filed transcript of record of proceedings dated 12-8-75	

Verified Complaint

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- x

TRANSCONTINENTAL OIL CORPORATION, TRECON OIL CO., LTD. and B. EDWIN SACKETT, individually and as nominee,

Plaintiffs,

- against -

TRENTON PRODUCTS COMPANY; BERNARD FEIN; HERZFELD & STERN; LOEB, RHOADES & CO.; GERSTLEY, SUNSTEIN & COMPANY; M. ARTHUR WEISS; LOUIS C. FIELAND and THERESA ZAPPLEY,

Defendants.

VERIFIED COMPLAINT

- x

Plaintiffs, by their attorneys, Kaufman, Taylor, Kimmel & Miller, complaining of the defendants, allege as follows:

GENERALLY AS TO ALL COUNTS

1. At all the times hereinafter mentioned, TRANSCONTINENTAL OIL CORPORATION (hereinafter referred to as "TRANS") was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. Prior to August 12, 1966, the principal office of TRANS was located at Scarsdale, New York and within the Southern District of New York. Since August 12, 1966, the principal office of TRANS has been and still is located in Greenwich, Connecticut.

2. TRECON OIL CO., LTD. (hereinafter referred to as "TRECON") is a corporation incorporated under the laws of the

Province of Alberta in the Dominion of Canada. Since August 12, 1966, it has been a wholly-owned subsidiary of TRANS.

3. On information and belief, at all the times hereinafter mentioned, TRENTON PRODUCTS COMPANY (hereinafter referred to as "TRENTON") was and still is a corporation organized and existing under the laws of the State of New Jersey, and has maintained its principal office at 660 Madison Avenue in the City of New York and within the Southern District of New York.

4. On information and belief, at all the times hereinafter mentioned BERNARD FEIN was and still is a resident of the State of New York.

5. Commencing in or about May 1960 and until August 12, 1966, FEIN was the president, a director and chief executive officer of TRANS, and exercised working control thereof together with TRENTON, a corporation of which said FEIN was a principal stockholder, president and sole active officer and director.

6. On information and belief, HERZFELD & STERN is a New York partnership engaged in the brokerage business in the City of New York.

7. On information and belief, LOEB, RHOADES & CO. is a New York partnership engaged in the brokerage business in the City of New York.

8. On information and belief, GERSTLEY, SUNSTEIN & COMPANY is a New York partnership engaged in the brokerage business in the City of New York.

9. (a) None of the defendants is a citizen or resident of the State of Connecticut, of which SACKETT is a resident.

(b) The amount in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars.

(c) Jurisdiction herein is based upon diversity of citizenship.

(d) This action is not a collusive one to confer on a Court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction.

10. At all the times hereinafter mentioned, TRANS has been and still is the owner of producing oil properties located in the State of Colorado, and from which TRANS has received monthly income raning from Two Thousand ($2,000.00) Dollars per month to Twelve Thousand ($12,000.00) Dollars per month.

FIRST COUNT ON BEHALF OF TRANS AND AGAINST TRENTON; FEIN; HERZFELD & STERN; LOEB, RHOADES & CO. AND GERSTLEY, SUNSTEIN & COMPANY

11. On or about October 1, 1959, TRANS entered into an agreement with Anglo-Pacific Oil & Gas, Ltd. (hereinafter referred to as "Anglo-Pacific") wherein and whereby, among other things, TRANS agreed to purchase all of the outstanding stock of White River Exploration Company for a purchase price of 1,000,000 shares of the common stock of TRANS and other consideration, subject to adjustments. On or about February 5, 1960, the said 1,000,000 shares were issued and delivered to Anglo-Pacific.

12. On information and belief, thereafter and on or about the 17th day of August 1960, Anglo-Pacific agreed to return to TRANS and did there and then deliver to TRANS 300,000 shares of the 1,000,000 shares theretofore delivered by TRANS to Anglo-Pacific, as hereinabove set forth.

13. On information and belief, thereafter and between August 17, 1960 and August 12, 1966, TRENTON and FEIN appropriated the said 300,000 shares of TRANS stock to their own uses and purposes, and caused the same to be transferred to divers persons for substantial consideration to themselves and without any payment or remuneration flowing therefrom to TRANS, all of the foregoing misappropriation and conversion of the said stock being without any authority or right in TRENTON or FEIN.

14. By reason of the foregoing, TRANS has been damaged in the amount of One Hundred Fifty Thousand ($150,000.00) Dollars.

SECOND COUNT ON BEHALF OF TRANS AND AGAINST TRENTON, FEIN, WEISS AND FIELAND

15. On or about the 12th day of April 1960, and while in control of TRANS, FEIN caused TRANS to authorize the issuance of 100,000 shares of the common stock of TRANS to one, Arthur A. Desilets.

16. On or about the 25th day of April 1960, the said 100,000 shares of stock were issued but on information and belief the said stock was never delivered by TRANS to the said Arthur A. Desiltes, and remained at all times the property of TRANS and within the sole possession and control of FEIN.

17. On information and belief, the said 100,000 shares of stock were thereafter appropriated by TRENTON and FEIN to their own uses and purposes, and on or about the 5th day of August 1966, the said 100,000 shares were transferred by TRENTON and FEIN to divers persons, for the sole and exclusive benefit of TRENTON and FEIN, and entirely without any payment or remuneration to TRANS for said 100,000 shares of stock.

18. By reason of the foregoing, TRANS has been damaged in the amount of Fifty Thousand ($50,000.00) Dollars.

THIRD COUNT ON BEHALF OF TRANS AND AGAINST TRENTON AND FEIN

19. This Count is brought pursuant to §§ 2, 5 and 12 of the Securities Act of 1933, as amended.

20. On information and belief, between August 5, 1966 and August 12, 1966, TRENTON and FEIN sold, transferred and distributed 533,900 unregistered shares of stock owned or controlled by them or of which they had custody, including 250,000 shares of the 400,000 shares thereof unlawfully converted by them (as alleged above in the "First Count" and the "Second Count"), as follows:

Record Owner	Number of Shares	Date of Transfer	Transferee
Samuel T. Brown	47,900	8/ 5/66	Various brokers
Arthur A. Desilets	100,000	8/ 5/66	M. Arthur Weiss; Louis C. Fieland
Samuel T. Brown	19,000	8/ 8/66	Various brokers
Samuel T. Brown	5,000	8/ 9/66	Various brokers
Samuel T. Brown	10,000	8/10/66	Various brokers

Record Owner	Number of Shares	Date of Transfer	Transferee
Samuel T. Brown	52,000	8/11/66	Various brokers
Elsie Chamberlain	140,000	8/12/66	Herzfeld & Stern
Elsie Chamberlain	10,000	8/12/66	Loeb, Rhoades & Co.
Trenton Products Co.	100,000	8/12/66	Herzfeld & Stern
Trenton Products Co.	50,000	8/12/66	Gerstley, Sunstein & Company

21. On information and belief, the said transfers were made by TRENTON and FEIN in connection with a public distribution of said shares and in violation of the Securities Act in that the said sales, transfers and distribution were made without a registration statement having been filed with the Securities and Exchange Commission, as required by the Securities Act, and without having obtained an exemption therefor from the applicable provisions of said Securities Act.

22. On information and belief, the transfers aforesaid made by TRENTON and FEIN constitute a violation of the Securities Act and thereby rendered TRANS subject to claims for damages and suits by persons acquiring the aforementioned securities.

FOURTH COUNT ON BEHALF OF TRANS AND AGAINST TRENTON AND FEIN

23. This Count is brought pursuant to §§ 2, 5 and 12 of the Securities Act of 1933, as amended,

24. TRANS repeats and realleges each and every allegation contained in Paragraph 20 hereinabove.

25. For at least six years prior to August 12, 1966, TRENTON and FEIN were in control of TRANS and were controlling persons within the meaning of the Securities Act of 1933 and Rule 401 of the Securities and Exchange Commission.

26. The sales, transfer and distribution hereinabove described in Paragraph 20, were made by TRENTON and FEIN while they were controlling persons within the meaning of the Securities Act of 1933 and the said Rule 401.

27. On information and belief, the sales, transfer and distribution aforesaid made by TRENTON and FEIN constitute a violation of the Securities Act and the said Rule 401, and thereby rendered TRANS subject to claims for damages and suits by persons acquiring the aforementioned securities.

FIFTH COUNT ON BEHALF OF TRANS AND TRECON OIL CO. LTD. AND AGAINST TRENTON AND FEIN

28. In or about April 1960, TRECON became the registered owner of eight-eighths working interest in thirteen petroleum and natural gas leases, as follows: Natural Gas Leases 330 and 382, and Petroleum and Natural Gas Leases 113620, 113621, 113622, 95474, 95475, 95476, 95477, 95478, 95479, 95480 and 95481, all located in the so-called Sedalia and Oyen gas fields in the Province of Alberta, Canada. On August 10, 1960, FEIN had stated to the stockholders of TRANS in writing that the said gas properties contained gas wells and proven as well as semi-proven gas reserves estimated at 55 billion cubic feet of gas.

29. The beneficial owners of TRECON and the aforesaid assets were TRANS to the extent of five-eighths thereof; TRENTON to the extent of two-eighths thereof; and Anglo-Pacific to the extent of one-eighth thereof. The foregoing five-eighths beneficial interest of TRANS was a valuable asset of TRANS.

30. Thereafter, and while in full control of the business affairs of TRECON, FEIN negligently, wastefully and by reason of gross incompetence on his part, permitted all of said leases to be cancelled for failure to pay Crown rentals, except for the aforementioned leases numbered 330, 382 and 95474.

31. The gas leases so permitted by FEIN to be cancelled covered 6,870 acres of gas reserves containing, on information and belief, approximately 2.5 billion cubic feet of proven and semi-proven gas reserves, and constituted a loss of income to TRECON and TRANS of One Hundred Thirty-Five Thousand ($135,000.00) Dollars.

32. In addition to the aforesaid losses sustained by reason of said cancellations, among the leases cancelled was Petroleum and Natural Gas Lease 95481 which covered the southeast one-quarter of Section 34, TWP. 30, Range 5, West of the 4th meridian. By reason of the cancellation and the loss of said lease, and its acquisition by another company from the Crown, a completed shut-in gas well owned by TRECON and located in Section 34 is barred and denied, under the laws and regulations of the Province of Alberta from hooking up to any gas line or being rendered productive in any respect unless approval of such other company is obtained. It is expected that the cost of obtaining such consent will be substantial and that when such cost, which

cannot be specifically estimated now, is obtained, TRECON will be required to surrender to said company one-fourth of the gas production from said well, the loss of such production constituting a loss of income to TRECON and TRANS of Forty-Seven Thousand ($47,000.00) Dollars.

33. Prior to the cancellation of the ten petroleum and natural gas leases, as aforesaid, TRECON had entered into an agreement with several Canadian "Royalty Owners," wherein and whereby TRECON agreed to pay to said Royalty Owners certain two-and-one-half (2-1/2 %) percent gross overriding royalties upon the income from the production therefrom, so long as TRECON was the owner of said leases, and that it would not permit the said leases to be lost or transferred without first offering the same to the Royalty Owners. By reason of the aforesaid gross neglect, waste and incompetence on the part of FEIN in permitting the said ten leases to be cancelled, the said agreement between TRECON and the Royalty Owners was breached. TRECON was subjected to a claim for damages by the Royalty Owners. On August 12, 1966, as hereinabove set forth, FEIN yielded control of TRANS to new management and thereupon TRANS promptly proceeded to attempt to develop the thirteen gas leases believed by its new management to be owned by TRECON. Upon discovery by said new management that ten of the aforementioned gas leases had been cancelled and that the Royalty Owners were asserting and would assert claims for damages by reason of the breach of the agreement between TRECON and the Royalty Owners, TRECON was caused to enter into negotiations for a new agreement with said Royalty Owners, wherein and whereby, among other things, TRECON will be required to grant to said

Royalty Owners a new two-and-one-half (2-1/2 %) percent gross overriding royalty upon new gas leases acquired by TRECON on September 12, 1966, and numbered Petroleum and Natural Gas Leases 9044 and 9045, affecting lands in the vicinity of the remaining three leases held by TRECON, as aforesaid.

34. By reason of the foregoing, TRECON was further damaged in that the two new leases aforesaid acquired by TRECON on September 12, 1966, became subservient to the said new, overriding royalty agreement. The additional gross overriding royalty which TRECON will be required to pay to the Royalty Owners upon said Petroleum and Natural Gas Leases 9044 and 9045 will amount to approximately Ten Thousand ($10,000.00) Dollars.

35. By reason of the actions of gross neglect, waste and incompetence on the part of FEIN, hereinabove referred to, TRECON was damaged in the approximate amount of One Hundred Ninety-Two Thousand ($192,000.00) Dollars.

SIXTH COUNT ON BEHALF OF TRANS AND AGAINST TRENTON AND FEIN

36. At all the times hereinafter mentioned, TRANS was the legal or beneficial owner of a sixty-five (65%) percent working interest in the so-called Rangely oil fields in Colorado, as described above in Paragraph 10. Between 1960 and 1966, TRENTON and FEIN had loaned or advanced to TRANS substantial sums of money and had used the monthly income received from the Rangely oil fields to reduce and pay off a portion of the said loans and advances and interest thereon.

37. In fact and in truth, at least the sum of Twenty-Five Thousand ($25,000.00) Dollars from the income of the oil runs from the Rangely oil fields was retained and converted by TRENTON and FEIN for their own uses and purposes and never applied by them to the payment of TRANS' operating expenses or to the reduction of the indebtedness claimed by them to be owed by TRANS.

38. By reason of the foregoing, TRANS has been damaged in the proximate amount of Twenty-Five Thousand ($25,000.00) Dollars.

SEVENTH COUNT ON BEHALF OF TRANS AND AGAINST TRENTON AND FEIN

39. From in or about April 1960 and until August 12, 1966, TRENTON was the beneficial owner of two-eighths of the eight-eighths working interest in the Sedalia and Oyen gas fields for which the aggregate amount of lease rentals payable by TRENTON for its said two-eighths working interest and by TRANS for its five-eighths working interest was the sum of Thirty-Six Thousand Seven Hundred Forty-One and 20/100 ($36,741.20) Dollars.

40. Despite the fact that TRENTON had been vested by FEIN with the beneficial ownership of the said two-eighths working interest, TRENTON and FEIN caused TRENTON's share of the lease rentals thereon to be paid for by TRANS, such payments amounting to the sum of Nine Thousand One Hundred Eighty-Five and 30/100 ($9,185.30) Dollars.

41. By reason of the foregoing, TRANS has been damaged in the amount of Nine Thousand One Hundred Eighty-Five and 30/100 ($9,185.30) Dollars.

EIGHTH COUNT ON BEHALF OF TRANS AND AGAINST TRENTON, FEIN AND THERESA ZAPPLEY

42. On June 17, 1965, FEIN caused TRANS to appoint himself "and/or THERESA ZAPPLEY to act as Transfer Agents individually for the transfer of all certificates of stock of" TRANS.

43. On June 17, 1965, FEIN caused TRANS to authorize the collection by TRENTON from transferrors of TRANS stock of the sum of Two ($2.00) Dollars for each transfer transaction, plus Twenty-Five ($0.25) Cents for each new certificate, ostensibly for the purpose of reimbursing TRENTON for having advanced the monies for the printing of certificates and for other unstated purposes.

44. FEIN and ZAPPLEY thereafter assumed the duties of Transfer Agents and served in that capacity until on or about August 24, 1966, during which time said defendants and TRENTON received payment from stockholders and brokers of the various fees above-mentioned for effecting transfers of stock of TRANS.

45. On information and belief, during the period from June 17, 1965 until on or about August 24, 1966, the said defendants (a) failed to obtain from many transferrors endorsements and assignments duly executed; (b) failed to keep and maintain complete and accurate transfer records and "stop notices" and in other respects failed and neglected to perform the duties of transfer agents in an efficient, business-like and proper manner; and (c) failed to obtain and affix Federal and New York State transfer tax stamps for many such transfers.

46. By reason of the foregoing, TRANS may be subject to claims for damages by former stockholders of TRANS whose endorsements were not properly obtained and the extent of such liability by TRANS to such former stockholders and others cannot at this time be reasonably computed or determined; and, in addition, by reason of the failure to pay the aforementioned Federal and New York State transfer taxes, TRANS may become subject to liabilities and penalties for such unlawful transfers, the amount of such liability being estimated at this time to be at least the sum of Thirty-Five Thousand ($35,000.00) Dollars.

NINTH COUNT ON BEHALF OF B. EDWIN SACKETT AND AGAINST TRENTON AND FEIN

47. On June 22, 1966, TRENTON and FEIN entered into an agreement in writing with SACKETT wherein and whereby, among other things, TRENTON agreed to sell to SACKETT all of the shares of common stock of TRANS owned by it of record and beneficially, which shares were represented by TRENTON and FEIN to aggregate 650,000 shares.

48. On August 12, 1966, TRENTON and FEIN delivered to SACKETT 650,000 shares consisting of 600,000 shares in their possession and 50,000 shares held in escrow by a third party, and SACKETT then performed all the terms and conditions on his part to be performed pursuant to the terms of the agreement aforesaid.

49. As appears above in Paragraph 20, between August 5, 1966 and August 12, 1966, TRENTON and FEIN sold, conveyed and transferred 533,900 shares of the common stock of TRANS to other third parties. The "First Count" and the "Second Count" above

allege that 250,000 of said 533,900 shares (consisting of the 100,000 shares standing in the name of Arthur A. Desilets and the 150,000 shares standing in the name of Elsie Chamberlain), were the property of TRANS and that TRENTON and FEIN had wrongfully misappropriated and converted 250,000 of such shares. If the Court should find that said 250,000 shares of stock were misappropriated and converted by TRENTON and FEIN, then SACKETT makes no claim herein for such shares of stock. If this Court should find that any of the shares of stock described in Paragraph 20 above was stock lawfully owned of record or beneficially by TRENTON on June 22, 1966, then all such stock should have been transferred and delivered by TRENTON and FEIN to SACKETT, pursuant to the agreement of June 22, 1966.

50. On information and belief, on June 22, 1966, TRENTON was the record or beneficial owner of 133,900 shares of TRANS stock then standing in the name of Samuel T. Brown, together with an additional 300,000 shares of TRANS stock, such aggregate amount of 433,900 shares of TRANS stock being in excess of 600,000 shares of TRANS stock in the possession of TRENTON on said date, which 600,000 shares were delivered by TRENTON and FEIN on August 12, 1966, as hereinabove set forth in Paragraph 48.

51. Between August 5, 1966 and August 12, 1966, TRENTON and FEIN willfully and fraudulently transferred or purported to transfer all of the foregoing shares of TRANS stock, except for the 150,000 shares remaining in the name of TRENTON, to wit (a) the 100,000 shares standing in the name of Arthur A. Desilets, (b) the 150,000 shares standing in the name of Elsie

Chamberlain, (c) the 133,900 shares standing in the name of Samuel T. Brown, and (d) 150,000 of the 300,000 shares standing in the name of TRENTON, all of which 533,900 shares, together with the 150,000 shares remaining in the name of TRENTON, should have been delivered by TRENTON and FEIN to SACKETT, pursuant to the agreement of June 22, 1966.

52. On information and belief, some of the transfers so made by TRENTON and FEIN, as hereinabove set forth, were made to persons holding the same as transferees and nominees for TRENTON and FEIN, and TRENTON and FEIN are so placed with reference to such nominal transferees as to be able, upon the Order of this Court, to effect the return and delivery of said stock to SACKETT.

53. TRENTON and FEIN should be ordered by this Court to specifically perform and deliver to SACKETT all those shares of stock, as above set forth, over which they exercise control or have the legal or beneficial ownership, and as to such shares of stock which cannot be so delivered, the damages sustained by SACKETT should be computed and determined.

TENTH COUNT ON BEHALF OF SACKETT AND AGAINST TRENTON AND FEIN

54. On June 22, 1966, TRENTON and FEIN entered into an agreement in writing with SACKETT wherein and whereby, among other things, TRENTON and FEIN represented (a) that TRANS was not in default under any of the thirteen leases itemized in Paragraph 28 hereinabove, and (b) that the issued and outstanding

stock of TRANSCONTINENTAL OIL CORPORATION consisted of no more than 3,600,000 shares of common stock.

55. In truth and in fact, as to the first misrepresentation set forth, ten of such thirteen leases had been permitted by TRENTON and FEIN to be cancelled, as hereinabove set forth in Paragraph 30; and in truth and in fact, as to the second misrepresentation set forth, the number of shares of TRANS issued and outstanding consisted, on June 22, 1966, of 3,977,605 shares; of all of which facts TRENTON and FEIN had full and complete knowledge or of which they should in the proper conduct of the business affairs of TRANS have had knowledge.

56. The representations made by TRENTON and FEIN as aforesaid, were false and were known by said defendants to be false when made by them, or when made by them such representations were so made with a reckless and gross disregard of the facts constituting the aforesaid misrepresentations.

57. At the time that TRENTON and FEIN made the said representations, SACKETT relied thereon, all to his detriment by reason of the fact that the value of the leases constituting the assets of TRANS was substantially diminished and the equity and voting strength of each share of stock acquired by SACKETT pursuant to the agreement of June 22, 1966, were diluted and diminished.

58. By reason of the foregoing, SACKETT sustained damages in the amount of One Hundred Thousand ($100,000.00) Dollars.

WHEREFORE, plaintiffs demand judgment as follows.

A. Under the FIRST COUNT, damages in the amount of One Hundred Fifty Thousand ($150,000.00) Dollars; a temporary and permanent injunction enjoining and restraining TRENTON; FEIN; HERZFELD & STERN; LOEB, RHOADES & CO. and GERSTLEY, SUNSTEIN & COMPANY from transferring any or all of the shares of TRANS described in said Count;

B. Under the SECOND COUNT, damages in the amount of Fifty Thousand ($50,000.00) Dollars; temporary and permanent injunction enjoining and restraining TRENTON, FEIN, WEISS and FIELAND from transferring any or all of the shares of TRANS described in said Count;

C. Under the THIRD COUNT and the FOURTH COUNT, damages in such amount as may be determined upon the trial hereof; a bond or undertaking securing TRANS against further damages by reason of claims and suits by persons acquiring the securities mentioned therein, as well as any fines, penalties and expenses incurred by reason of the violation of the Securities Act;

D. Under the FIFTH COUNT, damages in the amount of One Hundred Ninety-Two Thousand ($192,000.00) Dollars;

E. Under the SIXTH COUNT, damages in the amount of Twenty-Five Thousand ($25,000.00) Dollars; an accounting as to the income and expenses of TRANS for the period commencing in 1960 and continuing until August 12, 1966;

F. Under the SEVENTH COUNT, damages in the amount of Nine Thousand One Hundred Eighty-Five and 30/100 ($9,185.30) Dollars.

G. Under the EIGHTH COUNT, damages in such amount as may be determined, together with a bond or undertaking securing TRANS against further claims and damages by stockholders as well as from assessments and penalties which may be imposed by reason of violations of the laws of the United States and of the State of New York;

H. Under the NINTH COUNT, specific performance requiring TRENTON and FEIN to deliver to SACKETT the balance of the shares agreed to be sold by them to SACKETT, pursuant to the agreement of June 22, 1966, to the extent that such shares remain in the possession or control of said defendants; a temporary and permanent injunction enjoining and restraining said defendants from transferring any or all of such shares of TRANS stock; and damages in such amount as this Court may compute with regard to the balance of such shares as have heretofore been wrongfully transferred by said defendants to divers third parties;

I. Under the TENTH COUNT, damages in the amount of One Hundred Thousand ($100,000.00) Dollars;

and such other and further relief as to this Court may seem just and proper, together with costs and disbursements of this action.

KAUFMAN, TAYLOR, KIMMEL & MILLER
Attorneys for Plaintiffs

By Irwin M. Taylor
A Member of the Firm

41 East 42nd Street
New York, N. Y. 10017
Telephone: MU 2 2983

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

B. EDWIN SACKETT, being duly sworn, deposes and says:

1. That deponent, individually and as nominee, is one of the plaintiffs in the within action;

2. That deponent is the President of both TRANSCONTINENTAL OIL CORPORATION and of TRECON OIL CO., LTD., the corporate plaintiffs in the within action;

3. That deponent has read the foregoing complaint and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true;

4. This verification is made by deponent because TRANSCONTINENTAL OIL CORPORATION and TRECON OIL CO., LTD. are both foreign corporations and deponent is an officer of each, to wit, the President of each.

5. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: corporate books and records and documents in the possession of plaintiffs.

Sworn to before me this
8th day of February 1967.

Irwin M. Taylor

IRWIN M. TAYLOR
NOTARY PUBLIC, State of New York
No. 30-9294090
Qualified in Nassau County
Commission Expires March 30, 1968

B. Edwin Sackett

B. EDWIN SACKETT

Amended Answer and Counterclaims
of Defendants Trenton Products
Company ("Trenton") and
Bernard Fein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

TRANSCONTINENTAL OIL CORPORATION, TRECON OIL CO., LTD. and EDWIN B. SACKETT, individually and as nominee,

Plaintiffs,

-against-

TRENTON PRODUCTS COMPANY, BERNARD FEIN, HERZFELD & STERN, LOEB, RHOADES & CO., GERSTLEY, SUNSTEIN & COMPANY, M. ARTHUR WEISS, LOUIS C. FIELAND and THERESA ZAPPLEY,

Defendants. 67 Civil 559

----------X

AMENDED ANSWER AND COUNTERCLAIMS

TRENTON PRODUCTS COMPANY and BERNARD FEIN,

Defendants and Third-Party Plaintiffs,

-against-

PHILLIP P. GOODKIN, LOUIS GOODKIN, MICHAEL A. ROBERTS, DAVID FRANKEL, JAMES E. DAVIS, PAUL A. ROSSBOROUGH, J. STREICHER & COMPANY, HARRY B. LESLIE, BERTRAM F. FAGENSON, EDWIN B. SACKETT and FAGENSON AND FRANKEL COMPANY, INCORPORATED,

Additional Defendants on Counterclaim.

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Defendants and third-party plaintiffs Trenton Products Company ("Trenton") and Bernard Fein ("Fein") for their amended answer to the complaint herein, allege:

FIRST DEFENSE

1. Deny the allegations of paragraph 1 of the complaint, except admit the allegations of the

first sentence of paragraph 1 and, upon information and belief, admit the allegations of the third sentence of paragraph 1, and admit that for a time prior to August 12, 1966, the principal office of Transcontinental Oil Corporation ("Transcontinental") was located at Scarsdale, New York.

2. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 6 through 8, 10, 28 and 29 of the complaint.

3. Admit the allegations of paragraphs 3 and 4 of the complaint.

4. Deny each and every allegation contained in paragraphs 5, 12 through 14, 17 through 23, 25 through 27, 30 through 35, 37 through 41, 43 through 46, 48 through 53 and 55 through 58 of the complaint.

5. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint, except admit that the answering defendants are not citizens or residents of the State of Connecticut and that this action has not been brought collusively with the answering defendants to confer jurisdiction upon the court.

6. Upon information and belief admit the allegations contained in the first sentence of paragraph 11 of the complaint, and allege that they are without knowledge or information sufficient to form

a belief as to the truth of the remaining allegations of paragraph 11.

7. Deny each and every allegation of paragraphs 15 and 16 of the complaint, except admit that in about 1960 Transcontinental authorized the issuance of 100,000 shares and said shares were issued to one Arthur A. Desilets.

8. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36 of the complaint, except admit that between 1960 and 1966 defendants Trenton and Fein had loaned or advanced to plaintiff Transcontinental substantial sums of money.

9. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 of the complaint, except admit that defendants Fein and Zappley by appointment of plaintiff Transcontinental acted as transfer agents for Transcontinental from about June 1965 to August 1966.

10. Deny each and every allegation contained in paragraphs 47 and 54 of the complaint, and respectfully refer to the written agreement of June 22, 1966 between plaintiff Edwin B. Sackett ("Sackett") and defendants Trenton and Fein for its terms and provisions.

SECOND DEFENSE

11. The first, second, sixth and seventh counts of the complaint fail to state a claim upon which

relief can be granted in that the statute of limitations bars the bringing of said claims.

THIRD DEFENSE

12. The third, fourth and eighth counts of the complaint fail to state a claim upon which relief can be granted in that they do not state a justiciable case or controversy under Article III, Clause 2 of the United States Constitution and the third and fourth counts do not state a claim upon which relief can be granted under the statute invoked, the Securities Act of 1933.

FOURTH DEFENSE

13. In the ninth and tenth counts of the complaint plaintiffs have failed to join parties indispensible to the prosecution of those counts.

FIFTH DEFENSE

14. Plaintiff Transcontinental in or about August, 1966 for a valuable consideration duly executed and delivered to defendant Fein a general release in writing whereby Transcontinental duly released Fein from the alleged claims set forth in the first through eighth counts of the complaint.

SIXTH DEFENSE

15. In or about August, 1966, in a stockholder's derivative action in the United States District Court for the Southern District of New York, entitled

"B. Edwin Sackett v. Transcontinental Oil Corporation, Bernard Fein, et al., 65 Civ. 2500", and brought on behalf of plaintiff Transcontinental, the same claims were asserted against defendant Fein as have been asserted in the first through eighth counts of the complaint herein and a judgment was rendered by the District Court. By reason thereof the claims of Transcontinental as set forth in the first through eighth counts have been previously adjudicated and determined.

FIRST COUNTERCLAIM OF DEFENDANTS TRENTON AND FEIN AGAINST PLAINTIFFS TRANSCONTINENTAL AND SACKETT

16. On information and belief, plaintiff Transcontinental was at all times mentioned herein and is a corporation duly organized and existing under the laws of the State of Delaware with its principal office in Greenwich, Connecticut.

17. On information and belief, plaintiff Sackett is a resident of the State of Connecticut and is the president of Transcontinental and dominates and controls the business and affairs of Transcontinental.

18. Defendant Trenton, one of the counterclaimants, was at all times mentioned herein and is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in New York.

19. At all times mentioned herein defendant Fein, the second counterclaimant, was and is a resident of the State of New York.

20. On August 15, 1966, the defendants Trenton and Fein owned in excess of 300,000 shares of common stock in Trarscontinental, and said shares were duly registered by Transcontinental in the respective names of defendants Trenton or Fein or in brokers' names.

21. On information and belief, brokers holding shares for defendants Trenton and Fein have on behalf of themselves and the said defendants presented stock certificates to the stock transfer agent of plaintiff Transcontinental, for transfer to and registration in the names of purchasers or their nominees.

22. On information and belief, the stock transfer agent of plaintiff Transcontinental, in or about October, 1966, refused to transfer said shares, asserting that it was acting on instructions from the plaintiffs Transcontinental and Sackett and their counsel.

23. In so refusing to transfer and in causing the transfer agent to refuse to transfer any of the said shares owned by defendants Trenton and Fein, as alleged in the foregoing, plaintiffs Transcontinental and Sackett acted unlawfully and with reckless and willful disregard of the rights of Trenton and Fein.

24. By reason of the foregoing, plaintiffs Transcontinental and Sackett converted the 300,000 shares

owned by defendants Trenton and Fein, and said plaintiffs are accordingly liable to defendants Trenton and Fein for the value of said shares owned by them on said date, or $210,000, and are also liable to said defendants for exemplary damages in the amount of $210,000.

SECOND COUNTERCLAIM AGAINST PLAINTIFFS TRANSCONTINENTAL AND SACKETT

25. Defendants Trenton and Fein repeat and reallege paragraphs 16 through 23 hereof.

26. In refusing to transfer and in causing the transfer agent of plaintiff Transcontinental to refuse to transfer any of the shares owned by defendants Trenton and Fein, plaintiffs Transcontinental and Sackett have created a cloud upon the title of the shares in Transcontinental owned by defendants Trenton and Fein, and the entire value to defendants of the 300,000 shares of Transcontinental owned by them was destroyed.

27. Plaintiffs Transcontinental and Sackett are liable to defendants Trenton and Fein in the amount of $210,000, the reasonable value of the said shares of Transcontinental, and for exemplary damages in the amount of $210,000.

THIRD COUNTERCLAIM AGAINST ADDITIONAL DEFENDANTS

28. The defendants named in this count, hereinafter together referred to as "additional defendants" are Phillip P. Goodkin, Louis Goodkin, Michael A.

Roberts, David Frankel, James E. Davis, Paul A. Rossborough, J. Streicher & Company, Harry B. Leslie, Bertram F. Fagenson, Edwin B. Sackett and Fagenson and Frankel Company, Incorporated.

29. This cause of action arises under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S. Code, Section 73j(b) and Rule 10b-5, 17 CFR 240.10b-5, promulgated by the Securities and Exchange Commission under the said Act. This Court has jurisdiction of this action under Section 27 of the said Act, 15 U.S. Code Section 78aa, as amended. Venue is laid in the Southern District of New York by reason of the performance in said District of the acts in pursuance of the conspiracy alleged herein.

30. Defendant and counterclaimant Trenton was at all times relevant hereto and is a corporation duly organized and existing under the laws of the State of New Jersey.

31. Defendant and counterclaimant Fein was and is a resident of the State of New York.

32. On information and belief, at all times relevant hereto defendants James E. Davis, Bertram F. Fagenson, Harry B. Leslie, Michael A. Roberts, David Frankel, Phillip P. Goodkin and Louis Goodkin were and are residents of the State of New York; defendant Edwin B. Sackett was and is a resident of the State of Connecticut; and defendant Paul A. Rossborough was and is a resident of the State of Ohio.

33. On information and belief, at all times relevant hereto defendant J. Streicher & Company was and is a partnership duly organized and existing under the laws of the State of New York, engaged in the stockbrokerage business in New York City.

34. On information and belief, at all times relevant hereto defendant Fagenson and Frankel Company, Incorporated, was and is a corporation duly organized and existing under the laws of the State of New York.

35. On or about June 22, 1966, defendants Trenton and Fein entered into an agreement in writing with defendant Sackett, acting on behalf of himself and as nominee for the other additional defendants, pursuant to which agreement defendant Trenton sold to Sackett, on August 12, 1966, 650,000 shares of common stock of Transcontinental.

36. On August 12, 1966 and thereafter, defendants Trenton and Fein owned in excess of an additional 300,000 shares of common stock of Transcontinental, and shares were duly registered by Transcontinental in the respective names of Trenton and Fein or brokers acting as nominees for them.

37. On information and belief, in connection with the aforesaid agreement of June 22, 1966, the additional defendants, directly or indirectly, in the Southern District of New York, by use of means or instruments of transportation or communication in interstate

commerce or of the mails, employed devices, schemes or artifices to defraud or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or engaged in acts, practices or a course of business which operated as a fraud and deceit upon defendants Trenton and Fein; and used and employed in connection with said sale of securities, manipulative and deceptive devices and contrivances in contravention of the Securities Exchange Act of 1934 and of the rules and regulations duly prescribed thereunder by the Securities and Exchange Commission.

38. On information and belief, prior to the execution of the aforesaid agreement of June 22, 1966, the exact time being unknown to counterclaimants, the additional defendants entered into a common plan or scheme, in the Southern District of New York, to induce Trenton and Fein, by schemes, statements and other acts constituting a violation of the said Act and regulations, to enter into the agreement of June 22, 1966.

39. On information and belief, pursuant to said common plan or scheme, the additional defendants, with intent to defraud defendants Trenton and Fein, made untrue statements of material facts or omitted to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, in that the said additional defendants

(a) omitted to state that it was the intention of the additional defendants to acquire the 650,000 shares of common stock of Transcontinental owned by Trenton for the purpose of obtaining control of Transcontinental and to manipulate and artificially maintain the market price of the common stock of Transcontinental;

(b) omitted to state that it was the intention of the additional defendants, after they gained control of Transcontinental, unlawfully to prevent defendants Trenton and Fein from selling or transferring their remaining shares of Transcontinental, in order artificially to maintain the market price of the common stock of Transcontinental, and in order to renegotiate with Trenton and Fein the terms of the agreement of June 22, 1966; and

(c) made an untrue statement as follows: Prior to the execution of the agreement of June 22, 1966, defendants Trenton and Fein inquired of defendant Sackett, acting for himself and as nominee as alleged herein, whether Harry B. Leslie was one of the persons on behalf of whom Sackett was acting and, further, informed Sackett that they would not sell the shares in Transcontinental to a group of purchasers which included Leslie, because of Leslie's close associations with Lowell Birrell, a person with a bad business reputation and Thomas Cairns, a person who had defrauded Transcontinental; and in response to the aforesaid inquiry of Trenton and Fein, Sackett knowingly and falsely stated that defendant Leslie was not one of the persons on behalf of whom he was acting.

40. In reliance upon the foregoing fraudulent acts, defendants Trenton and Fein entered into the agreement of June 22, 1966.

41. On information and belief, after acquiring the 650,000 shares of Transcontinental from Trenton and pursuant to the aforementioned common plan or scheme, the additional defendants combined their stock holdings of 650,000 shares, and other shares of Transcontinental owned by them or their close associates, family and clients, in order effectively to control the business and affairs of Transcontinental and have, from August 12, 1966 to the present, controlled said corporation.

42. On information and belief, pursuant to the said conspiracy, the additional defendants have artificially maintained the market price of the shares of Transcontinental, and have sold shares owned by them, their associates, family and clients at artificially inflated prices.

43. On information and belief, the additional defendants have artificially maintained the price of the shares of Transcontinental by preventing defendants Trenton and Fein from selling or transferring their remaining shares of Transcontinental as hereinafter alleged.

44. On information and belief, in and about October, 1966 and thereafter, the additional defendants, pursuant to the said common plan or scheme and without lawful ground, in the exercise of their aforementioned control of Transcontinental directed and caused Continental Stock Transfer Corporation, the transfer agent of

Transcontinental, to refuse to transfer shares to, and to refuse to register shares in the names of, purchasers of shares from defendants Trenton and Fein or from their nominees, when such shares were presented to Continental for such purpose.

45. By reason of the foregoing, the additional defendants have prevented defendants Trenton and Fein from exercising rights of ownership in their 300,000 shares of Transcontinental by selling their shares and have created a cloud upon the title of the said shares, and the entire value of the said shares has been destroyed.

46. By reason of the foregoing, Trenton and Fein have been damaged in the amount of $210,000, the reasonable value of the said 300,000 shares, for which the additional defendants are liable, and the said additional defendants are also liable for exemplary damages in the amount of $210,000.

W H E R E F O R E, the answering defendants demand judgment

(a) against the plaintiffs dismissing the complaint, with the costs and disbursements of this action;

(b) on the first and second counterclaims against plaintiffs Transcontinental and Sackett in the amount of $210,000, together with exemplary damages in the amount of $210,000;

(c) on the third counterclaim against the additional defendants in the amount of $210,000, together with exemplary damages in the amount of $210,000; and

(d) for the costs and disbursements of this action.

STROOCK & STROOCK & LAVAN
Attorneys for Defendants and
Third Party Plaintiffs
Office and P. O. Address
61 Broadway
New York, New York 10006
HA 5-5200

Plaintiffs' Reply to
Counterclaims

RECEIVED
DEC 13 1968
STROOCK & STROOCK & LAVAN

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- x

TRANSCONTINENTAL OIL CORPORATION,
TRECON OIL CO., LTD. and
B. EDWIN SACKETT, individually
and as nominee

Plaintiffs

- against -

TRENTON PRODUCTS COMPANY; BERNARD FEIN;
HERZFELD & STERN; LOEB, RHOADES & CO.;
GERSTLEY, SUNSTEIN & COMPANY; M. ARTHUR
WEISS; LOUIS C. FIELAND and THERESA
ZAPPLEY

Defendants.

- x 67 Civil 559

TRENTON PRODUCTS COMPANY and
BERNARD FEIN

R E P L Y

Defendants and
Third-Party Plaintiffs

- against -

PHILLIP P. GOODKIN, LOUIS GOODKIN,
MICHAEL A. ROBERTS, DAVID FRANKEL,
JAMES E. DAVIS, PAUL A. ROSSBOROUGH,
J. STREICHER & COMPANY, HARRY B.
LESLIE, BERTRAM F. FAGENSON, EDWIN
B. SACKETT and FAGENSON AND FRANKEL
COMPANY, INCORPORATED,

Additional Defendants
on Counterclaim.

- x

Plaintiffs TRANSCONTINENTAL OIL CORPORATION and B. EDWIN SACKETT, by their attorneys, Kaufman, Taylor, Kimmel & Miller, for their reply to the counterclaims of defendants TRENTON PRODUCTS COMPANY and BERNARD FEIN:

AS TO THE FIRST COUNTERCLAIM

1. Deny each and every allegation contained in Paragraph 17, except that plaintiff SACKETT admits he is a resident of the State of Connecticut.

2. Deny each and every allegation contained in Paragraphs 20, 23 and 24.

3. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 21.

4. Deny each and every allegation contained in Paragraph 22, except that plaintiffs admit that in or about October 1966 the transfer agent of Transcontinental refused to transfer certain shares, as specified in the instructions given to said transfer agent.

AS TO THE SECOND COUNTERCLAIM

5. Deny each and every allegation contained in Paragraphs 26 and 27.

WHEREFORE, plaintiffs demand judgment dismissing the counterclaims and demand judgment as prayed for in their complaint.

KAUFMAN, TAYLOR, KIMMEL & MILLER
Attorneys for Plaintiffs

By Irwin M. Taylor
A Member of the Firm
41 East 42nd Street
New York, N. Y. 10017 MU 2 2983

Additional Defendants'
Reply to Counterclaims

46

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DEC 13 1968

STROOCK & STROOCK & LAVAN

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- x

TRANSCONTINENTAL OIL CORPORATION,
TRECON OIL CO. LTD. and
B. EDWIN SACKETT, individually
and as nominee

Plaintiffs

- against -

TRENTON PRODUCTS COMPANY; BERNARD FEIN;
HERZFELD & STERN: LOEB, RHOADES & CO.;
GERSTLEY, SUNSTEIN & COMPANY; M. ARTHUR
WEISS; LOUIS C. FIELAND and THERESA
ZAPPLEY

Defendants

- x

67 Civil 559

REPLY

TRENTON PRODUCTS COMPANY and
BERNARD FEIN

Defendants and
Third-Party Plaintiffs

- against -

PHILLIP P. GOODKIN, LOUIS GOODKIN,
MICHAEL A. ROBERTS, DAVID FRANKEL,
JAMES E. DAVIS, PAUL A. ROSSBOROUGH,
J. STREICHER & COMPANY, HARRY B.
LESLIE, BERTRAM F. FAGENSON, EDWIN
B. SACKETT and FAGENSON AND FRANKEL
COMPANY, INCORPORATED

Additional Defendants
on Counterclaim

- x

PHILIP P. GOODKIN, LOUIS GOODKIN, MICHAEL A. ROBERTS, DAVID FRANKEL, JAMES E. DAVIS, PAUL A. ROSSBOROUGH, J. STREICHER & COMPANY, HARRY B. LESLIE, BERTRAM F. FAGENSON, B. EDWIN SACKETT and FAGENSON AND FRANKEL COMPANY, INCORPORATED, designated

herein as "Additional Defendants on Counterclaim," by their attorneys, Kaufman, Taylor, Kimmel & Miller, for their reply to said counterclaim:

1. Deny each and every allegation contained in Paragraph 29 and in Paragraphs 36 through 45, both inclusive.

2. Admit the allegations contained in Paragraph 35, except that as to the terms of said agreement, the additional defendants herein respectfully refer to the said agreement itself.

WHEREFORE, the additional defendants demand judgment dismissing the counterclaim, together with the costs and disbursements of this action.

KAUFMAN, TAYLOR, KIMMEL & MILLER
Attorneys for Additional Defendants

By Irwin M. Taylor
A Member of the Firm
41 East 42nd Street
New York, N.Y. 10017 MU 2 2983

Pre-Trial Order

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK
- x

TRANSCONTINENTAL OIL CORPORATION, TRECON OIL CO. LTD. and B. EDWIN SACKETT, individually and as nominee,

Plaintiffs

- against -

TRENTON PRODUCTS COMPANY, BERNARD FEIN, HERZFELD & STERN, LOEB, RHOADES & CO., GERSTLEY, SUNSTEIN & COMPANY, A. ARTHUR WEISS, LOUIS C. FIELAND and THERESA ZAPPLEY

Defendants

PRE-TRIAL ORDER

Calendar No. 442(4)

- x

TRENTON PRODUCTS COMPANY and BERNARD FEIN

Defendants and Third Party Plaintiffs

- against -

PHILLIP P. GOODKIN, LOUIS GOODKIN, MICHAEL A. ROBERTS, DAVID FRANKEL, JAMES E. DAVIS, PAUL A. ROSSBOROUGH, J. STREICHER & COMPANY, HARRY B. LESLIE, BERTRAM F. FAGENSON, EDWIN B. SACKETT and FAGENSON AND FRANKEL COMPANY, INCORPORATED

Additional Defendants on Counterclaim

Docket No. 67 Civ 559

- x

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UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK
- x

TRANSCONTINENTAL OIL CORPORATION, TRECON OIL CO. LTD. and B. EDWIN SACKETT, individually and as nominee,

Plaintiffs

- against -

TRENTON PRODUCTS COMPANY, BERNARD FEIN, HERZFELD & STERN, LOEB, RHOADES & CO., GERSTLEY, SUNSTEIN & COMPANY, A. ARTHUR WEISS, LOUIS C. FIELAND and THERESA ZAPPLEY

Defendants

- x

TRENTON PRODUCTS COMPANY and BERNARD FEIN

Defendants and Third Party Plaintiffs

- against -

PHILLIP P. GOODKIN, LOUIS GOODKIN, MICHAEL A. ROBERTS, DAVID FRANKEL, JAMES E. DAVIS, PAUL A. ROSSBOROUGH, J. STREICHER & COMPANY, HARRY B. LESLIE, BERTRAM F. FAGENSON, EDWIN B. SACKETT and FAGENSON AND FRANKEL COMPANY, INCORPORATED

Additional Defendants on Counterclaim

- x

PRE-TRIAL ORDER

Calendar No. 442(4)

Docket No. 67 Civ 559

On September 15 , 1970, the parties to this action, by their attorneys, appeared before the Court at a pre-trial conference, pursuant to Local Calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken:

(a) The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph (i) of this pre-trial order.

(b) The parties agreed that the trial of this action should be based upon this order and upon the pleadings as amended.

(c) The parties stipulated that the following facts are not in dispute in this action, each party reserving the right to object to the materiality of any such stipulated facts and their relevancy to the issues:

1. Prior litigation involving the parties to this action consists of the following:

a. An action in this District Court, bearing Docket No. 65 Civ. 2500, and entitled "B. Edwin Sackett, Plaintiff, against Transcontinental Oil Corporation, Bernard Fein, Roy L. Kropp, Leon M. Robinson and Trenton Products Company, Defendants" was commenced on August 24, 1965. The action was brought by said plaintiff, derivatively, on behalf of Transcontinental Oil Corporation and for its benefit for alleged breaches by the named individual defendants and by Trenton Products Company of their fiduciary duties to Transcontinental. The action was settled, after due notice to the stockholders of the corporation and a hearing thereon. An order and judgment was granted by Hon. R. R. Tyler, Jr. on July 12, 1966, approving the settlement as fair and adequate under the circumstances and directing the parties to proceed to its consummation in accordance with its terms. The settlement was based upon an agreement between Trenton, Fein and Sackett, dated June 22, 1966.

b. An application was made by B. Edwin Sackett, as a stockholder of Transcontinental Oil Corporation, in the Court of Chancery of the State of Delaware, New Castle County, for an order requiring an election to be held for the directors of Transcontinental Oil Corporation, said application having been granted on September 8, 1965. Pursuant to stipulation between the parties, the proceeding involving the said application was dismissed with prejudice in October 1966 in connection with the settlement of the action in this District Court, described above in subparagraph "a".

2. According to the minute books of Transcontinental, Bernard Fein served without compensation as a director of the corporation from April 3, 1956 until August 12, 1966; as president from April 4, 1956 until November 30, 1959 and also from August 12, 1960 until August 12, 1966; as chairman of the Board of Directors from November 30, 1959 until August 12, 1966 (a position not provided for in the by-laws of Transcontinental). One Orville V. Burkinshaw was president from November 30, 1959 until August 12, 1960. On or about October 1, 1959 1,000,000 shares of Transcontinental were issued to Anglo-Pacific and Burkinshaw was president of Transcontinental for the period between November 30, 1959 and August 12, 1960.

3. Trenton acquired 150,000 shares of Transcontinental stock in connection with a loan made by it to Transcontinental in the sum of $242,500.00, pursuant to a loan agreement dated April 11, 1960. Simultaneously therewith, Trenton became the owner of a one-quarter undivided interest in the Sedalia, Canada natural gas properties of which the record owner was Trecon Oil Company, Ltd. Trenton Products Company was organized in New Jersey by one Bernard Green. Mr. Green was an attorney from Trenton, New Jersey. Green died in or about 1964-1965. Among the officers and directors of the company after Green's death were Bernard Fein and his brother A. Edwin Fein. Bernard Fein has no recollection of ever having seen the minute books of Trenton

Products Company and does not know where they may be found.

4. On or about October 1, 1959 Transcontinental entered into an agreement with Anglo-Pacific Oil and Gas, Ltd., whereby Transcontinental purchased all of the outstanding stock of White River Exploration Company for 1,000,000 shares of the common stock of Transcontinental and other consideration. According to the stock transfer records, stock certificate No. A18912 for 1,000,000 shares was issued to Anglo-Pacific c/o Orville V. Burkinshaw on or about February 5, 1960.

5. Subject to the rights of defendants to object to the authenticity and completeness of the minute books, according to the minute books of Transcontinental, on April 12, 1960 the Transcontinental Board of Directors authorized the issuance (a) to Trenton of 150,000 of its authorized but unissued shares; (b) to Arthur A. Desilets, the nominee of Marmot Holdings Limited, of 100,000 of its authorized but unissued shares; and (c) to Jeanne R. Mason of 200,000 of its authorized but unissued shares.

6. Subject to the rights of defendants to object to the authenticity and completeness of the minute books, according to the minute books of Transcontinental, on May 27, 1960 the Transcontinental Board of Directors authorized the issuance to Theodore H. Joffe of 20,000 of its authorized but unissued shares.

7. Subject to the rights of defendants to object to the authenticity and completeness of the minute books, according to the minute books of Trans-

continental, with respect to the 150,000 shares of Transcontinental stock that we authorized for issuance by the Board of Directors on April 12, 1960 for delivery to Trenton, on May 27, 1960 the Board of Directors authorized the issuance of 141,000 treasury shares and 9,000 shares of authorized but as yet unissued shares of Transcontinental to Trenton.

8. In October, 1960, Transcontinental's income from all its income producing properties was withheld as the result of litigation pending in Colorado and on October 13, 1961, an order was entered in the District Court of Colorado appointing a Receiver of Transcontinental's sole income-producing property. Such Receivership continued until December 14, 1964, when said Court entered an order discharging the Receiver and dismissing the action.

9. All litigation involving Transcontinental was finally determined on March 24, 1965 in Transcontinental's favor.

10. In or about April 1960, Trecon became the registered owner of eight-eighths working interest in thirteen petroleum and natural gas leases, as follows: Natural Gas Leases 330 and 382, and Petroleum and Natural Gas Leases 113620, 113621, 113622, 95474, 95475, 95476, 95477, 95478, 95479, 95480 and 95481, all located in the so-called Sedalia and Oyen gas fields in the Province of Alberta, Canada. On August 10, 1960, Fein sent a letter to stockholders concerning these properties and other matters.

11. At the time of the acquisition of the said Sedalia gas properties in April 1960, the record owner was Trecon which held the said property beneficially to the extend of five-eights thereof for Transcontinental, two-eights thereof for the benefit of Trenton and one-eighth thereof for the benefit of Anglo-Pacific Oil and Gas, Ltd.

12. Of the leases mentioned above in ¶10, leases numbered 95475, 95476, 95477, 95478, 95479, 95480 and 95481 were cancelled on May 24, 1962. Leases numbered 113620, 113621 and 113622 were cancelled on January 23, 1963. The foregoing leases were cancelled for non-payment of rentals.

13. On April 12, 1960 Trenton loaned $242,500.00 to Transcontinental, as set forth in ¶3. The net balance of said loan, including interest, was claimed by Trenton to amount to $225,460.72 and was assigned by Trenton to B. Edwin Sackett on August 12, 1966, pursuant to the terms of the agreement made between them on June 22, 1966.

14. According to the minute books of Transcontinental, Roy A. Kropp and Leon M. Robinson resigned as directors of Transcontinental on August 8, 1966. Bernard Fein and A. Edwin Fein resigned as directors of Transcontinental on August 12, 1966. Bernard Fein resigned as president on August 12, 1966.

15. On June 17, 1965, at a special meeting of the Board of Directors, a resolution was adopted appointing Bernard Fein and/or Theresa Zappley to act as transfer agents individually for the transfer of all certificates of stock of Transcontinental.

(d) 1. The exhibits which the plaintiffs expect to offer at the trial are as follows: (1) all exhibits previously identified in all examinations before trial conducted by the parties; (2) all pleadings and motions affecting the parties hereto in prior litigation between them maintained in this Court (Docket No. 65 Civ 2500 and in the Court of Chancery of the State of Delaware (C.A. 2239); (3) books and records of account of Transcontinental; (4) the work sheets of Harold Putterman, former accountant for Transcontinental; (5) the stock transfer records of Transcontinental; (6) the minute books of Transcontinental; (7) correspondence to or from Bernard Fein as an officer of Transcontinental; (8) contract and closing documents affecting August 12, 1966 transaction between Trenton and Fein, on the one hand, and Sackett, as nominee, on the other hand. Defendants Trenton and Fein will object to the plaintiff's offer of any documents referred to in items (3) through (7) above, unless copies thereof are furnished to defendants within a reasonable time prior to trial.

2. The exhibits which each of the defendants expects to offer at the trial are as follows:

a. Defendants Trenton and Fein expect to offer at trial some of the exhibits which have been marked for identification upon the depositions taken in this action and in the related New York State Court action. In addition, defendants will offer all of the papers filed in the previous derivative action maintained in this Court; all of the documents exchanged at the closing of the contract of June 22, 1966; letter dated August 13, 1960 from Transcontinental to Bernard Green; Bill of Sale from Transcontinental

to Trenton dated March 22, 1961, and undated memo from B. Fein to Irwin M. Taylor with enclosures. Plaintiffs will be furnished with a copy thereof within a reasonable time after entry of this order.

b. Defendant Fieland states that he cannot determine at this time the exhibits expected to be offered at the trial, except that he will offer copies of the stock certificates for the 70,000 shares issued to this defendant, the warranty letter of immediate transferability, and a copy of his invoice to Transcontinental, dated September 1, 1965.

3. The Additional Defendants on Counterclaim do not expect to offer at the trial any exhibits other than those which have been marked for identification on their examinations before trial.

4. Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to each other and to the Court by serving and filing a supplemental pre-trial memorandum which shall set forth the reasons why the exhibit was not theretofore identified. No exhibit may be offered at trial unless identified in a pre-trial memorandum.

5. Each party reserves the right to object to the materiality or relevancy of each document listed above and defendants Trenton and Fein will object to the authenticity of the documents listed in (d) 1 (3) through (6) above.

(e) The parties agree that the witnesses whom each party intends to call along with the specialty of experts to be called are as follows:

1. Plaintiffs intend to call the following witnesses in direct proof of their case:

B. Edwin Sackett

Sol Smith

James A. Latham

Arthur A. Desilets

Harold Putterman

Lewis G. Cole

Milton Paulson

An appraiser of the market value of Transcontinental stock

2. Defendants intend to call the following witnesses:

a. Defendants Trenton and Fein:-

Bernard Fein

Theresa Zappley

A. Edwin Fein

B. Edwin Sackett

A stock market expert

b. Defendant Fieland states that he cannot determine at this time the witnesses he intends to call except for Bernard Fein and Irwin M. Taylor.

3. Should any party decide to call any additional witnesses after the date on which this order is signed, prompt notice of their identity should be given to each other party and to the Court and such notice shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in such notice.

(f) The complaint sets forth ten counts. The position of the plaintiffs with respect to each of the ten counts is as follows: [First Eight Counts on behalf of Transcontinental]

FIRST COUNT - that defendants Fein and Trenton misappropriated and converted 300,000 shares of treasury stock of Transcontinental some time between August 17, 1960 and August 12, 1966; that Transcontinental did not learn of such conversion before October 6, 1966; and that the said conduct by Fein and Trenton constituted a breach of their fiduciary duties.

SECOND COUNT - that some time prior to August 5, 1966, defendants Fein and Trenton misappropriated and converted 100,000 shares of Trans treasury stock, then standing in the name of one Arthur A. Desilets, the exact date of such misappropriation and conversion being unknown to plaintiffs and concealed by said defendants; that on or about August 5, 1966 the said defendants transferred the said 100,000 shares to M. Arthur Weiss (30,000 shares) and Louis C. Fieland (70,000 shares), the latter being one of the defendants herein and that said defendant Fieland had knowledge that defendants Fein and Trenton had no authority to transfer the said shares of stock to him; that said Fieland is a converter by reason of his refusal to return the said stock to Transcontinental; and that by reason of the foregoing, said conduct by Fein and Trenton constituted a breach of their fiduciary duties.

THIRD COUNT - that between August 5 and August 12, 1966 Trenton and Fein sold, transferred and distributed 533,900 unregistered shares of Transcontinental stock, which stock was either owned or controlled by them or of which they had custody, including the 250,000 shares of the 400,000 shares converted by them, as alleged in the first and second counts; that said transfers violated the Securities Act in that they were made in connection with a public distribution of these shares and without any exemption therefrom having been obtained; that at the time of the said transfers, Trenton and Fein were in control of Transcontinental and thereby rendered Transcontinental subject to claims for damages and suits by persons who acquired the said shares of stock.

FOURTH COUNT - that the shares of stock encompassed in the third count were transferred at a time when Trenton and Fein were in control of Trans and were controlling persons within the meaning of the Securities Act and Rule 401 of the Securities and Exchange Commission; that such transfers violated the Securities Act and said Rule 401 and thereby rendered Transcontinental subject to claims for damages and suits by persons who acquired the said shares.

FIFTH COUNT - that in or about April 1960, Trecon acquired an eight-eighths working interest in 13 petroleum and natural gas leases, all located in the so-called Sedalia and Oyen gas fields in the Province of Alberta, Canada; that Trecon then held the said working interest to the extent of five eighths beneficially for Transcontinental; two eighths beneficially for Trenton; and one eighth beneficially for Anglo-Pacific Oil & Gas, Ltd.; thereafter and while in full control of Trecon, Fein negligently permitted 10 of the 13 leases to be cancelled for failure to pay Crown rentals, the only leases being retained being numbered 330, 382 and 95474; that the gas leases which were cancelled covered approximately 6,870 acres of gas reserves estimated to contain 2.5 billion cubic feet of proven and semi-proven gas reserves and thereby a loss of income was sustained to Trecon and Trans of $192.000.00; that any loss attributable to Trenton and to Anglo-Pacific by reason of their respective beneficial ownership inures to the benefit of Trecon and Trans because on or before August 12, 1966 the entire beneficial interest of Trenton and Anglo-Pacific in Trecon had passed to Trecon and Transcontinental.

SIXTH COUNT - that between 1960 and 1966 Trenton and Fein loaned or advanced to Transcontinental various sums of money and against which they applied in payment the monthly income from the Rangely Oil Fields; and that of the total income received by them from such oil fields, Trenton and Fein retained for themselves above and beyond their loans and advances the sum of $25,000.00.

SEVENTH COUNT - that in the period between April 1960 and August 12, 1966, during which Trenton was the beneficial owner of two eighths of the eight eighths of the Sedalia and Oyen gas fields, Transcontinental was caused by Trenton and Fein to pay $9,185.30 as Trenton's share of the lease rentals, such sum now being properly reimburseable by Trenton and Fein to Transcontinental.

EIGHTH COUNT - that on June 17, 1965 Fein caused Transcontinental to appoint himself and his secretary, one Theresa Zappley, as transfer agents for the stock of Transcontinental; that in such capacity from June 17, 1965 until on or about August 24, 1966, the said defendants failed to obtain from many transferrors necessary endorsements and assignments duly executed, failed to keep and maintain accurate transfer records and failed to obtain and affix Federal and New York State Transfer Tax Stamps for many such transfers; and that by reason of the foregoing Transcontinental may be subject to claims for damages by former stockholders whose endorsements were not properly obtained and to liability also to the United States and to the State of New York for unpaid transfer taxes, the extent of such liability having been estimated at the sum of at least $35,000.00.

[NINTH and TENTH COUNTS on behalf of Sackett]

NINTH COUNT - that on June 22, 1966 Trenton and Fein agreed to sell Sackett all their shares of Transcontinental which were represented by them to aggregate 650,000 shares; that Trenton was the beneficial owner of 133,900 shares of Transcontinental stock then standing in the name of Samuel T. Brown and the record or beneficial owner of an additional 300,000 shares of Transcontinental stock, making an aggregate of 433,900 shares of Transcontinental stock which should have been delivered by Trenton and Fein to Sackett under the terms of the foregoing agreement; that 150,000 shares of said total were the property of Transcontinental and had been wrongfully converted by Trenton and Fein along with the 100,000 shares of stock standing in the name of Arthur A. Desilets (SECOND COUNT above); that if the Court should find that of the total of 533,900 shares referred to herein, 250,000 shares or such other amount as may be determined by this Court were misappropriated and converted by Trenton and Fein, then Sackett makes no claim for such misappropriated and converted shares; that as to all those shares of Transcontinental which Trenton and/or Fein held legally or beneficially, in excess of the number of shares represented by them, such shares should be delivered over to Sackett and as to any such shares which they can no longer deliver, the damages sustained by Sackett should be computed.

TENTH COUNT - that in the agreement aforesaid of June 22, 1962, Trenton and Fein represented that Transcontinental was then the owner of the 13 leases (described in the FIFTH COUNT above) and that the number of issued and outstanding shares of stock of Transcontinental did not exceed 3,600,000; that the said representations were false in that 10 of the said 13 leases were in default and the number of shares issued and outstanding was 3,977,605; that these representations made by Trenton and Fein were false and known by them to be false or were made with a reckless and gross disregard of the truth of the said misrepresentations; that Sackett relied on these representations, to his detriment, and thereby was damaged in the amount of $100,000.00.

The defendants, Trenton and Fein, have asserted two counterclaims against plaintiffs, Transcontinental and Sackett, and a third counterclaim against 10 additional defendants.

In substance, the first counterclaim asserts that Transcontinental and Sackett in or about October 1966 refused to permit Trenton and Fein to transfer certain shares of stock claimed to be owned by them; that such refusal constituted a conversion of said shares amounting to 300,000 shares, and that thereby Trenton and Fein were damaged in the amount of $210,000.00. The said plaintiffs contend that their refusal to permit the transfer of the said shares was based on the circumstance that the said shares were converted by the said defendants from Transcontinental and that the attempted transfer was a violation of the Securities Act of 1933 as amended, inasmuch as the said shares were unregistered and the purported transfer of said shares was attempted while said defendants were in control of Transcontinental.

In substance, the second counterclaim asserts that the refusal to permit the transfer of the said 300,000 shares created a cloud upon the purported title of Trenton and Fein and said shares and thereby Trenton and Fein were damaged to the extent of $210,000.00. Transcontinental and Sackett contend there is no merit to this position for the reasons set forth in the position asserted by Transcontinental and Sackett in connection with the first counterclaim.

In substance, as to the allegations contained in the third counterclaim of an alleged conspiracy, the Additional Defendants take the position that the said allegations are wholly without any foundation in fact and are a figment of the imagination of defendant Fein.

The position of defendants Trenton and Fein with respect to the foregoing counts and counterclaims is as follows:

FIRST COUNT - Defendants deny that they converted the aforesaid shares of Transcontinental and will show that the shares were rightfully acquired.

Defendants will prove that in 1960 a Canadian company named Anglo-Pacific Oil and Gas Company ("Anglo") acquired control of Transcontinental through the acquisition of 1,000,000 shares of Transcontinental. Shortly thereafter, Anglo borrowed $39,000 from Transcontinental and gave back its note collateralized by 550,000 shares of Transcontinental stock. Anglo defaulted on the note and the 550,000 shares, which were then almost worthless, were foreclosed and sold to Trenton.

In addition, all claims alleged by plaintiffs in this count are barred by limitations; have been released by the general releases delivered by Transcontinental to the defendants; and are barred by the doctrine of res judicata since the matter was adjudicated in the prior derivative action.

SECOND COUNT - Defendants deny converting the shares and will prove that the certificates were issued by Transcontinental in or about April, 1960, at a time when Anglo controlled the company. The shares were ultimately delivered by Anglo to Trenton for good and valuable consideration.

In addition, all claims alleged in this count are barred by limitations; have been released by the general releases delivered by Transcontinental to the defendants; and are barred by the doctrine of res judicata since the matter was adjudicated in the prior derivative action.

THIRD AND FOURTH COUNTS - Defendants deny the allegations of this count and will show that the transfers in question were not transfers of beneficial ownership but merely record transfers; and that most of these transfers took place after August 12, 1966, a date after Fein and Trenton relinquished control of Transcontinental.

In addition, it is now almost four years since the alleged public distribution and there have been no claims for damages or suits brought by persons who plaintiff claims acquired the aforesaid stock. The statute of limitations has thus run. Accordingly, there has been no damage to Transcontinental.

FIFTH COUNT - Defendant Fein denies negligence. He will prove that while he was in control of Transcontinental and Trecon both companies were virtually insolvent and rental monies had to be advanced by defendants Trenton and Fein in order to keep the leases. The annual rentals were approximately $18,000. After initially paying the annual rentals, defendants Fein and Trenton decided not to loan Transcontinental additional monies for payment of rentals on certain of the leases which in their opinion could not be justified. These leases were thereupon dropped through the nonpayment of the annual rentals, resulting in a substantial net savings of about $10,000 per annum to Trecon and Transcontinental.

In addition, the allegations of this count were a part of the prior derivative action and are barred by the doctrine of res judicata; they were released by Transcontinental; and are barred by limitations.

SIXTH COUNT - Defendants deny receiving any overpayments. In addition, this claim is barred by the doctrine of res judicata; by the general releases delivered by Transcontinental; and by limitations.

SEVENTH COUNT - Defendants deny the claim and, in addition, will show that the claim is barred by the doctrine of res judicata, by the general releases delivered by Transcontinental, and by limitations.

EIGHTH COUNT - Defendants deny any wrongdoing. They will prove that in June 1965, the company which had been acting as the transfer agent for Transcontinental refused to continue to serve in that capacity because of Transcontinental's inability to pay for said services. Defendants Fein and Zappley were therefore required to undertake the duties of transfer agent. Their burdens were further compounded by the transfer agent's refusal to turn over their records until they were paid.

While acting as transfer agents, defendants Fein and Zappley performed their functions as best could be accomplished under the circumstances, and obtained all assignments and tax stamps where possible.

In addition, Transcontinental has not incurred, and cannot prove any damages.

NINTH COUNT - As is true with respect to all of the ten counts of the complaint, the allegations of plaintiffs bear no relation to the actual facts. Defendants will prove that on June 22, 1966, in settlement of the derivative action referred to above, defendant Trenton entered into a contract with plaintiff Sackett whereunder Trenton agreed to sell 650,000 shares of Transcontinental to Sackett. Defendant Fein was not a party to the contract, received no payment under the contract and never agreed to sell any shares to Sackett. Furthermore, there is no representation in the contract that the 650,000 shares which were delivered to Sackett were "all" of the shares owned by defendants Trenton and Fein. On the contrary, the contract specifically refers to the sale of "650,000 shares" without any representation that the 650,000 shares constituted "all" of the stock owned by Trenton or Fein.

In addition, the contract sued upon specifically limits any liability of Trenton to $10,000.

Defendants Trenton and Fein intend to amend their answer to allege that this count is barred by the Statute of Frauds and the Parol Evidence Rule.

TENTH COUNT - The defendants deny the allegations of this count. In addition, they deny that the plaintiff's have incurred any damages as a result of the allegations of the tenth count and if any damages are proven they are limited to the $10,000 limitation contained in the agreement. Said defendants intend to amend their answer to allege that this count is barred by the Statute of Frauds and the Parol Evidence Rule.

FIRST COUNTER-CLAIM - Defendants Trenton and Fein will prove that in or about October 1966 Transcontinental wrongfully refused to permit Trenton and Fein to transfer certain shares of stock which they own; that such refusal constituted a conversion of such shares, and that Trenton and Fein have thereby been damaged in the amount of $210,000.

SECOND COUNTER-CLAIM - Defendants Trenton and Fein here allege that Transcontinentals' refusal to permit the transfer of their 300,000 shares created a cloud upon the title of Trenton and Fein to said shares and thereby damaged Trenton and Fein in the amount of $210,000.

THIRD COUNTER-CLAIM - Defendants Trenton and Fein bring the third counter-claim against plaintiff Sackett and the additional defendants who were joined in the action and who are the persons on behalf of whom Sackett acted in contracting with Trenton to acquire the 650,000 shares of Transcontinental stock. The claim is based upon section 10(b) of the Securities and Exchange Act of 1934

and Rule 10(b)-5, promulgated by the Securities and Exchange Commission under the said Act. Defendants Trenton and Fein will prove that the additional defendants have entered into a conspiracy to defraud defendants Trenton and Fein by wrongfully inducing Trenton to enter into the agreement of June 22, 1966 and to sell its 650,000 shares of Transcontinental. In connection therewith, the additional defendants omitted to state that it was their intention to acquire the 650,000 shares of Transcontinental owned by Trenton for the purpose of obtaining control of Transcontinental in order to manipulate and artificially maintain the market price of the common stock of Transcontinental; omitted to state that it was the intention of the additional defendants, after they gained control of Transcontinental, to unlawfully prevent defendants Trenton and Fein from selling and transferring their remaining shares of Transcontinental in order to artificially maintain the market price of the common stock of Transcontinental and in order to renegotiate with Trenton and Fein the terms of the agreement of June 22, 1966; and made untrue statements of material facts when, prior to the execution of the agreement of June 22, 1966, defendants Trenton and Fein inquired of defendant Sackett acting on behalf of the additional defendants, as to whether one Harry B. Leslie was one of the persons on behalf of whom Sackett was acting and informed Sackett that Trenton would not sell it shares of Transcontinental to a group of purchasers which included Mr. Leslie because of Mr. Leslie's prior association with persons who had defrauded Transcontinental and with other persons with bad business reputations, including one Lowell Birell; and in response to the aforesaid inquiry of Trenton and Fein, Sackett knowingly and falsely stated that defendant Leslie was not one of the persons on behalf of whom he was acting. In reliance upon the foregoing fraudulent acts of the additional defendants, Trenton entered into the agreement of June 22, 1966. Defendants will further prove that after the additional defendants acquired the 650,000 shares of Transcontinental from Trenton, and purusant to their plan and scheme, the additional defendants combined their stockholdings in Transcontinental in order to control the business affairs of Transcontinental and have used their control to artificially maintain the price of the shares of Transcontinental by preventing defendants Trenton and Fein from selling or transferring their remaining shares, all to the damage of Trenton and Fein in the amount of $210,000.

ADDITIONAL DEFENSES - The additional defenses which will be relied upon by defendants Trenton and Fein are as follows:

A. The First, Second, Sixth and Seventh Counts of the complaint fail to state a claim upon which relief can be granted in that the statute of limitations bars the bringing of said claims.

B. The Third, Fourth and Eighth Counts of the complaint fail to state a claim upon which relief can be granted in that they do not state a justiciable case or controversy under Article III, Clause 2 of the United States Constitution and the Third and Fourth Counts do not state a claim upon which relief can be granted under the statute invoked, the Securities Act of 1933.

C. In the Ninth and Tenth Counts of the complaint, plaintiffs have failed to join parties indispensible to the prosecution of those counts, the persons on behalf of whom plaintiff Sackett acted as nominee.

D. Plaintiff Transcontinental, in or about August, 1966, for valuable consideration, duly executed and delivered to defendant Fein a general release in writing whereby Transcontinental duly released Fein from the alleged claims set forth in the First through Eighth Counts of the complaint.

E. In or about August, 1966 in a stockholders derivative action in the United States District Court of the Southern District of New York, entitled "B. Edwin Sackett v. Transcontinental Oil Corporation, Bernard Fein, et al., 65 Civ. 2500", and brought on behalf of plaintiff Transcontinental, the same claims were asserted against defendant Fein as have been asserted in the First through Eighth Counts of the complaint herein. A judgment was rendered by the District Court dismissing the complaint on the merits. By reason thereof, the claims of Transcontinental as set forth in the First through Eighth Counts have been previously adjudicated and determined.

Defendant FIELAND's position is as follows:

1. Defendant FIELAND rendered legal services to TRANSCONTINENTAL in the years 1963, 1964 and 1965, in certain litigation then pending in the Supreme Court, New York County (Index No. 1132/1961). Defendant FIELAND was retained to represent TRANSCONTINENTAL in said litigation by TRANSCONTINENTAL's then President, Chairman of the Board, and chief stockholder, defendant FEIN.

TRANS became indebted to FIELAND on account of such legal services.

2. An invoice for this indebtedness in the sum of $35,000 was transmitted to TRANSCONTINENTAL on September 1, 1965, and was acknowledged as due and owing by defendant FEIN on behalf of TRANSCONTINENTAL.

3. Without defendant FIELAND's prior request, and on the initiative of defendant FEIN, in or about August, 1966, defendant FIELAND received 70,000 shares of TRANSCONTINENTAL stock, issued by TRANSCONTINENTAL to defendant FIELAND, in his name, represented by certificates duly signed and countersigned in regular form, together with a letter from TRANSCONTINENTAL, signed by defendant FEIN as President, representing and warranting that the subject 70,000 shares were unrestricted and immediately "negotiable" and "transferable". No restriction whatsoever against transfer appeared on the face of the certirficates or on any part thereof. To the contrary, said certificates were in usual form and stated that the shares of common stock represented

thereby were ". . . transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed". In exchange for these shares, defendant FIELAND ~~issued~~ delivered a general release to TRANSCONTINENTAL, which TRANSCONTINENTAL has retained and has never offered to return, surrender or cancel. Said shares of Transcontinental were received by Fieland in satisfaction of his claim against Transcontinental for legal services rendered to it.

4. Defendant FIELAND never had any knowledge of the original source of the said 70,000 shares, nor of any infirmity in the transfer of such shares to him. Said shares, at the time of the delivery to defendant FIELAND, had a market value substantially less than $35,000.

5. After receipt of the aforesaid 70,000 shares, defendant FIELAND commenced the sale thereof through a member firm of the New York Stock Exchange, but was prevented from consummating such sale because, TRANSCONTINENTAL, through Mr. Irwin Taylor, had placed a stop-order on the transfer of the sold shares represented by some of the certificates issued to defendant FIELAND, although said certificates were duly endorsed by him. This stop-order was based on the ground that the subject shares had been received by defendant FIELAND for investment.

6. Plaintiffs claim that defendant FEIN personally assumed TRANSCONTINENTAL's obligation in the sum of $35,000 to defendant FIELAND, and that defendant FIELAND had knowledge thereof. Plaintiffs further claim that the source of the 70,000 shares was a certificate in the amount of 100,000 shares issued to one Desilets, and that said certificate had been converted by the defendant FEIN. Plaintiffs

also claim that defendant FEIN delivered the subject 70,000 shares to defendant FIELAND without authority.

7. Defendant FIELAND denies any knowledge of the negotiations or the agreement between defendant FEIN and the other parties herein, prior to or at the time of the issuance of such TRANSCONTINENTAL shares to defendant FIELAND. Defendant FIELAND denies that he was a party to these negotiations or a party to such agreement.

8. Defendant FIELAND has neve r received any cash payment whatsoever from TRANSCONTINENTAL on account of its $35,000 principal indebtedness to him.

9. TRANSCONTINENTAL has discharged its indebtedness to defendant FIELAND on its books as paid.

10. Having failed to pay the aforesaid indebtedness, TRANSCONTINENTAL now refuses to permit transfer of the shares issued in payment thereof, thus retaining the benefits of the services rendered ~~to~~ by it ~~from~~ defendant FIELAND without making any payment whatsoever therefor.

(g) The following are all the claims for damages of for other relief asserted by the plaintiffs as to this date:

1. As to the FIRST COUNT, Transcontinental is entitled to recover damages in the amount of $150,000.00 against Trenton and Fein for the conversion of 300,000 shares of Transcontinental stock, together with a temporary and permanent injunction enjoining and restraining them from the transfer of the Transcontinental stock described in said count.

2. As to the SECOND COUNT, Transcontinental is entitled to recover damages in the amount of $50,000.00 against Trenton and Fein for the conversion of 100,000

shares of Transcontinental stock and $35,000.00 against Fieland for converting 70,000 of said shares, together with a temporary and permanent injunction enjoining Trenton, Fein and Fieland from transferring any or all of the shares described in said count.

2. As to the THIRD and FOURTH COUNTS, Transcontinental seeks a bond or undertaking securing Transcontinental against any claims and suits by persons who acquired the securities mentioned in said count, by reason of the transfer of stock to them by Trenton and/or Fein in violation of the Securities Act.

4. As to the FIFTH COUNT, Transcontinental seeks recovery for the following damages:

a.	Fair value of the loss of the investment made in the ten leases described in said count	$135,000.00
b.	Loss of future gas production of a shut-in gas well in Section 34	47,000.00
c.	Additional gross overriding royalty required to be paid to royalty owners	10,000.00
	TOTAL:	$192,000.00

5, As to the SIXTH COUNT, Transcontinental seeks recovery of the difference of $26,191.50, representing the difference between the monies loaned or advanced by Trenton and/or Fein to Transcontinental between 1960 and 1966, and the payments made to them from the monthly income received by Transcontinental or for its account

from the Rangely Oil Fields. Transcontinental seeks to have Trenton and Fein account for the monies so received by them from the oil runs of the Rangely Oil Fields.

6. As to the SEVENTH COUNT, during the period from April 1960 to August 12,1966, Transcontinental paid Trenton's share of the lease rentals payable by Trenton for its two-eighths working interest in the Sedalia-Oyen Gas Fields. Transcontinental claims this amount to be $9,185.30.

7. As to the EIGHTH COUNT, during the period from June 17, 1967 until on or about August 24, 1966, Fein and Zappley failed to perform their duties as transfer agents in an efficient, businesslike and proper manner and Transcontinental may thereby become subject to liabilities and penalties for unlawful transfers made by them. The amount of such liability remains undetermined except that it has been estimated to be at least the sum of $35,000.00.

8. As to the NINTH COUNT, as to any shares of stock of Transcontinental stock which the court may find Trenton and Fein were obligated to deliver to Sackett, under the agreement dated June 22, 1966, the said plaintiff seeks specific performance and as to such shares which cannot be so delivered, the said

plaintiff requests that his damages be computed and determined.

9. As to the TENTH COUNT, by reason of the false representations by Trenton and Fein of the number of shares of Transcontinental issued and outstanding, and by reason of the cancellation of the natural gas leases on the Sedalia and Oyen properties, the value of the stock acquired by Sackett from Trenton and Fein was impaired in value to the extent of $100,000, for which said plaintiff seeks said amount of damages.

The following are all the claims for damages asserted by defendants Trenton and Fein in their counterclaims:

1. As to the FIRST COUNTERCLAIM, by reason of Transcontinental's wrongful refusal to permit Trenton and Fein to transfer their shares of stock of Transcontinental, said shares have been wrongfully converted and Trenton and Fein have been damaged in the amount of $210,000.00.

2. As to the SECOND COUNTERCLAIM, by reason of Transcontinental's refusal to permit the transfer of 300,000 shares of Transcontinental owned by Trenton and Fein, a cloud was created upon the title of Trenton and Fein to said shares and thereby damaged Trenton and Fein in the amount of $210,000.00.

3. As to the THIRD COUNTERCLAIM against plaintiff Sackett and the additional defendants, defendants

Trenton and Fein seek recovery of $10,000.00 for violations by the additional defendants of § 10(b) of the Securities and Exchange Act of 1934 and Rule 10(b)-5 promulgated thereunder by reason of a conspiracy entered into by the additional defendants to defraud defendants Trenton and Fein by wrongfully inducing Trenton to enter into the agreement of June 22, 1966 and to sell 650,000 shares of Transcontinental.

4. Defendant intends to move at the trial to amend his answer to assert a counterclaim for $100,000 damages for conversion of his shares of Transcontinental stock & for declaration of title to said shares. Plaintiffs intends to oppose said application but if same is granted then plaintiffs will move to assert a claim over as against Trenton & Fein

(h) Plaintiffs at this time expect to require seven trial days. Defendants at this time expect to require six trial days.

(i) The issues which are in dispute are:

As to the FIRST and SECOND COUNTS:

Whether defendants Trenton and Fein converted any shares of Transcontinental. Plaintiffs also assert that such conduct constituted a breach of their fiduciary duties and defendants dispute plaintiffs' right to raise this issue.

Whether the claims are barred by limitations.

Whether the claims have been released by Transcontinental.

Whether the claims alleged are barred by the doctrine of res judicata.

Whether Transcontinental has suffered any damages as a result of the acts of the defendants.

As to the THIRD and FOURTH COUNTS:

Whether defendants Trenton and Fein made any of the transfers alleged in said counts.

Whether any transfers violated the Securities Act of 1933.

Whether Transcontinental has suffered any damages as a result of the acts of the defendants.

As to the FIFTH COUNT:

Whether defendant Fein was guilty of gross neglect, waste and incompetence in permitting ten Canadian gas leases to be cancelled.

Whether Transcontinental has been damaged as a result of defendant Fein's acts.

Whether this count is barred by the release obtained from Transcontinental by defendant Fein.

Whether this count is barred by the doctrine of res judicata, or by limitations.

As to the SIXTH COUNT:

Whether or not defendants Trenton and Fein obtained from Transcontinental $25,000 above and beyond the monies which defendants Trenton and Fein had loaned and advanced to Transcontinental.

Whether the claim is barred by the release delivered by Transcontinental to defendants Trenton and Fein.

Whether the claim is barred by the doctrine of res judicata, or by limitations.

As to the SEVENTH COUNT:

Whether defendants Trenton and Fein caused Transcontinental to pay $9,185.30 in connection with Trenton's obligations to pay its share of the rentals on the Sedalia properties.

Whether there was any obligation by Trenton to make any such payment.

Whether the claim is barred by the release delivered by Transcontinental.

Whether the claim is barred by the doctrine of res judicata, or by limitations.

As to the EIGHTH COUNT:

Whether defendants Trenton and Zappley acted negligently in performing their duties as transfer agents for Transcontinental.

Whether the acts of defendants Fein and Zappley resulted in any damage to Transcontinental.

As to the NINTH COUNT:

Whether defendants Trenton and Fein agreed to sell to Sackett all of their shares of Transcontinental, and whether they breached the agreement of June 22, 1966; and whether plaintiff Sackett has been damaged

As to the TENTH COUNT:

Whether the defendants Trenton and Fein made any false representations in connection with the June 22, 1966 agreement and whether plaintiff Sackett has been damaged as a result of any such representation.

As to the FIRST and SECOND COUNTERCLAIMS:

Whether Transcontinental wrongfully refused to permit Trenton and Fein to transfer their shares of Transcontinental.

Whether Trenton and Fein have been damaged as a result of Transcontinental's actions.

As to the THIRD COUNTERCLAIM:

Whether plaintiff Sackett and the additional defendants have conspired to defraud defendants Trenton and Fein in connection with the purchase of the shares of Transcontinental from Trenton under the agreement between them, dated June 22, 1966.

Whether Trenton and Fein have been damaged as a result of the activities of plaintiff Sackett and the additional defendants.

Proposed Eleventh Count

The plaintiffs' pre-trial memorandum states that it is the intention of the plaintiffs to move to amend their complaint so as to add an Eleventh Count on behalf of Transcontinental and against Trenton and Fein. During pre-trial conferences plaintiffs stated that it was their intention, upon the trial, to move to amend their complaint so as to add an Eleventh Count on behalf of Transcontinental and against Trenton and Fein. The defendants objected to the deferring of such motion until the time of trial and the plaintiffs were advised by the Pre-Trial Examiner to obtain the leave of the Court for such amendment. An application was made at Motion Part on July 21, 1970 for leave to amend the complaint by adding an Eleventh Count thereto in the form annexed hereto as Exhibit A. Judge Bonsal denied the application without prejudice to renewal of the motion upon the trial of the action. If such motion is granted, then an issue in dispute, unless already determined to be a breach of their fiduciary duties under the FIRST and SECOND COUNTS, will be as follows:

Whether the actions of Trenton and Fein in allegedly permitting and causing the purported transfer to Trenton of 300,000 shares of Transcontinental stock, returned by Anglo-Pacific, and the 100,000 shares in the name of Arthur A. Desilets were a breach of the fiduciary duties owing by Trenton and Fein to Transcontinental; whether the claims are barred by limitations; whether the claims have been released by Trans-continental; whether the claims alleged are barred by the doctrine of res judicata; whether Trans-continental has suffered any damages as a result of the acts of the defendants.

ted: New York, New York.
1970.

U.S.D.J.

CONSENTED TO:

Kaufman Taylor Kimmel & Miller
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KAUFMAN, TAYLOR, KIMMEL & MILLER
Attorneys for Plaintiffs and
Additional Defendants on Counterclaim

Stroock Stroock Lavan
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STROOCK & STROOCK & LAVAN
Attorneys for Trenton Products
Company and Bernard Fein

LOUIS C. FIELAND
Attorney Pro Se

ELEVENTH COUNT ON BEHALF OF TRANSCONTINENTAL AND AGAINST TRENTON AND FEIN

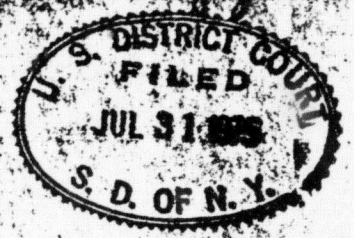
59. The acts of Trenton and Fein, as hereinabove alleged in paragraphs "THIRTEEN" and "SEVENTEEN", in permitting and causing the purported transfer to Trenton of the 300,000 shares returned by Anglo-Pacific and the 100,000 shares in the name of Arthur A. Desilets was a breach of the fiduciary duties owing by Trenton and Fein to Transcontinental. The said transfers of stock to Trenton were permitted to be made and were made in gross disregard of the rights of Transcontinental and were made in breach of trust of the duties which Fein and Trenton owed to Transcontinental and were made because of conflicting duties owed by the said defendants to others and because of pecuniary gains or profits directly or indirectly accruing or resulting to the said defendants.

60. Transcontinental has no adequate remedy at law.

Opinion and Order of
Hon. William C. Conner, D.J.,
dated July 31, 1975

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Copy



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

TRANSCONTINENTAL OIL CORPORATION, TRECON OIL CO. LTD. and B. EDWIN SACKETT, individually and as nominee,

Plaintiffs,

- against -

TRENTON PRODUCTS COMPANY, BERNARD FEIN, HERZFELD & STERN, LOEB, RHOADES & CO., GERSTLEY, SUNSTEIN & COMPANY, A. ARTHUR WEISS, LOUIS C. FIELAND and THERESA ZAPPLEY,

Defendants.

67 Civ. 559 (WCC)

OPINION AND ORDER

#42891

- -

TRENTON PRODUCTS COMPANY and BERNARD FEIN,

Defendants and Third-Party Plaintiffs,

- against -

PHILLIP P. GOODKIN, LOUIS GOODKIN, MICHAEL A. ROBERTS, DAVID FRANKEL, JAMES E. DAVIS, PAUL A. ROSSBOROUGH, J. STREICHER & COMPANY, HARRY B. LESLIE, BERTRAM F. FAGENSON, EDWIN B. SACKETT and FAGENSON AND FRANKEL COMPANY, INCORPORATED,

Additional Defendants on Counterclaim.

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CONNER, D. J.:

Commenced in February, 1967 by the filing of a ten-count complaint charging defendants with various acts of fraud, conversion, breach of fiduciary duty, contract and warranty, this action is reminiscent of the puzzles which require tracing paths through a maze -- in this case, a cat's cradle of stock transfer transactions -- to reach the desired destination -- in this case, determination of the ownership of the shares of a corporation which has been the victim over the years of sufficient fraud and embezzlement to scare off a

generation of investors. In addition to denying the principal allegations in the complaint, defendants have asserted a number of affirmative defenses and counterclaims.

Immediately prior to the commencement of the trial, the third, fourth and eighth counts were withdrawn by plaintiffs' counsel and the sixth count was dismissed by the Court as res judicata. A motion to amend the complaint to allege an eleventh count was denied at the conclusion of the trial.

The issue of liability under the first, second, fifth, seventh, ninth and tenth counts and the counterclaims was tried without a jury during September and October, 1974. This opinion incorporates the Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P.

FINDINGS OF FACT

The parties

1. Transcontinental Oil Corporation (Trans), is a Delaware corporation with its principal place of business in Connecticut.

2. Trecon Oil Co. Ltd. (Trecon), is a Canadian corporation organized in 1960 to hold title to certain petroleum and natural gas leases. It has been a wholly owned subsidiary of Trans since August 12, 1966.

3. B. Edwin Sackett (Sackett), is the Chairman of the Board of Trans and a citizen of the State of Connecticut. He first became a stockholder of Trans in the early 1950's.

4. Trenton Products Company (Trenton), was a New Jersey corporation which, at the time of the commencement of this action, had its principal place of business in this district.

5. Bernard Fein (Fein), is a citizen of the State of New York. He served, without compensation, as a director of Trans from April 3, 1956 until April 12, 1966; as its president from April 4, 1956 until November 30, 1959 and from August 12, 1960 to August 12, 1966; and as chairman of Trans's board of directors (a post not provided for in the by-laws) from November 30, 1959 until August 12, 1966. In addition, from in or about May 1960 until August 12, 1966, Fein, together with Trenton, a corporation of which he was a principal stockholder and at times president, exercised working control of Trans.

6. Louis C. Fieland (Fieland), is a New York attorney who was retained to represent Trans in certain state court litigation pending in 1963-65.

7. Herzfeld & Stern, Loeb, Rhoades & Co., Gerstley, Sunstein & Company, A. Arthur Weiss and Theresa Zappley are named defendants but are not active parties in the litigation.

8. Phillip P. Goodkin, Louis Goodkin, Michael A. Roberts, David Frankel, James E. Davis, Paul A. Rossborough, J. Streicher & Company, Harry B. Leslie, Bertram F. Faganson and Faganson and Frankel Company, Incorporated together with Sackett form the syndicate for whom Sackett acts as nominee in the ninth and tenth counts herein.

Background

9. In the early 1950's Fein became a shareholder of Trans, acquiring in excess of 100,000 shares from, among others, a New York stockbroker named Harry B. Leslie (Leslie) (Tr. 510-15), one of the additional defendants in this action.

10. In or about 1957 or 1958, Trans was controlled by a group related to the Virginia Iron, Coal & Coke Company which was headed by one Samuel Brown (Brown) (Tr. 512-13).

11. Around this time, Leslie, with some assistance from Fein, led a successful proxy fight to gain control of Trans (Tr. 513-14). Leslie then asked Fein to become president of Trans for a short period until he could find someone more familiar with the oil business to head the company (Tr. 514).

12. After Fein assumed the presidency, it was discovered that the prior management had been systematically looting the corporation (Tr. 515-16). Brown and his associates bought freedom from civil and perhaps criminal prosecution by a settlement whereby Virginia Iron, Coal & Coke Company purchased all of Trans's wells for $550,000 cash (Tr. 516-17), the bulk of this amount being applied in satisfaction of certain convertible debentures which the prior management had issued to finance Trans's drilling operations (Tr. 512-13). Trans also acquired Brown's stock in the company as treasury shares.

13. At this point Trans was left with only two assets, a tax loss, and $55,000 in cash with which United States Treasury bonds were purchased (Tr. 517-18).

14. About a year later (Tr. 518-19), Leslie introduced Fein to Messrs. Orville V. Burkinshaw (Burkinshaw) and Thomas Cairns (Cairns) who were the principals of a Canadian company, Anglo-Pacific Oil and Gas, Ltd. (Anglo) (Tr. 519-20).

15. Apparently to take advantage of Trans's tax loss carry-forward, Burkinshaw and Cairns proposed that in exchange for 1,000,000 shares of Trans's common stock and other consideration, Trans acquire from Anglo all the outstanding stock of the White River Exploration Company (White River), which was the owner of certain oil fields in Rangely, Colorado (the Rangely property) (Stipulated Fact [S.F.] #4; Tr. 519-20).

16. The proposal was accepted and embodied in a written agreement dated October 1, 1959, and stock certificate A18912 for 1,000,000 shares was issued to Anglo in care of Burkinshaw on or about February 5, 1960 (S.F. #4).

17. As a result of this transaction, Anglo acquired full management and control of Trans (Tr.519-21). Fein resigned as president of Trans effective November 30, 1959 and Burkinshaw was elected in his place (S.F. #2). Furthermore, Burkinshaw and his Anglo associates assumed a majority of the seats on the board of directors of Trans and all of its executive positions. The books and records of the corporation were removed to Anglo's Canadian offices (Tr. 520-22).

18. In April 1960 certificate A18912 was cancelled and in exchange Anglo was issued nine 100,000-share certificates numbered A19616 through A19624 and two 50,000-share certificates numbered A19625 and A19626. The cancelled certificate (A18912) is not involved in this litigation (Tr. 142-45).

19. During the tenure of Burkinshaw's group, the possibility of acquiring certain shut-in oil and gas wells in Sedalia, Alberta, Canada (the Sedalia property) was explored (Tr. 534). Since Trans was unable to secure the requisite financing on its own, Burkinshaw arranged with Fein to raise the needed funds. Fein in turn went to Bernard Green (Green), a Trenton, New Jersey lawyer who, together with a number of

his clients and a Doctor A. Arthur Weiss, undertook to finance the Sedalia deal (Tr. 535-36).

20. This group, which formed Trenton for the purpose, raised $225,000 (Tr. 535-36). Fein added $17,000 of his own (Tr. 536) and the total of $242,000 was lent to Trans (Tr. 537) pursuant to a loan agreement dated April 11, 1960 (S.F. #3).

21. In return, Trenton received Trans's note for $242,000, a security interest in the Rangely property, 150,000 shares of original issue Trans stock represented by thirty 5,000-share certificates numbered A19527 through A19556 (the Original Issue shares) and a three-eighths working interest in the Sedalia property (S.F. #3, #5, #13; Tr. 145-46).

22. The Original Issue shares were issued, pursuant to resolution of the board of directors, on April 25, 1960 (Ex. 64) and delivered to Trans's attorneys Buchman & Buchman, on Apr , 1960 (Ex. 13). The shares were subsequently delivered to Trenton (Tr. 1472).

23. Anglo, which also wished to participate in the Sedalia deal, entered into an agreement with Trenton whereby Anglo received one-third of Trenton's three-eighths working interest in the Sedalia property in exchange for 150,000 shares of the stock Anglo had acquired from Trans in the Rangley deal. These shares (the Anglo-Trenton shares) were represented by certificates A19620 for 100,000 shares and A19625 for 50,000 shares (Ex. J, 62).

24. Subsequently, Green expressed his understanding that Trenton was entitled to receive freely transferable shares rather than newly issued, unregistered stock. Apparently recognizing the validity of this claim, Trans's board of directors amended the earlier resolution and on May 27, 1960 authorized the issuance to Trenton of 141,000 treasury shares (the Brown shares) and 9,000 original issue shares (Ex. 40B) to replace the Original Issue shares which were to be surrendered to the corporation (Tr. 655-58).

25. In 1966, the bulk of the Brown shares was exchanged for other certificates issued in the names of third parties. A few thousand of the Brown shares and the 9,000 original issue shares remain unaccounted for.

26. It is unclear whether the Original Issue shares were ever in fact surrendered to the corporation. In any event, they were never cancelled and ultimately came back into the possession of Fein (Tr. 661).

27. The circumstances under which Trenton acquired the Brown shares and the additional 9,000 shares are not questioned. Trans's only claim is to the Original Issue shares, which it contends should have been cancelled. Sackett, however, asserts a claim to the Brown shares, which claim will be examined in depth below (Complaint, Count 9).

28. Trenton also exchanged the Anglo-Trenton shares for certificates A20083 for 50,000 shares and A20084 for 100,000 shares (Tr. 165-69, 653-54).

29. In 1966 the latter certificates (A20083 and A20084) were also surrendered and in their place certificates

B6736 through B6745 (derived from A20083) for 5,000 shares each were issued to Gerstley, Sunstein & Company and B6714 through B6716, B6718 through B6721 and B6723 through B6735 (derived from A20084) were issued to Herzfeld & Stern.

30. No challenge with respect to any of the transactions involving the Anglo-Trenton shares or their progeny is raised by Trans. However, Sackett individually and as nominee claims that these shares should have been transferred to him in conjunction with a 1966 transaction to be discussed in detail below (Complaint, Count 9).

31. As a result of the Sedalia deal, Trans (five-eighths) Trenton (two-eighths) and Anglo (one-eighth) became the beneficial owners of the entire working interest in thirteen petroleum and natural gas leases, as follows: Natural Gas Leases 330 and 382, and Petroleum and Natural Gas Leases 113620 through 113622 and 95474 through 95481. Trecon was the record owner of all thirteen leases (S.F. #10, 11).

32. On the same date that the Original Issue shares were authorized, and for reasons which remain unclear, the board of directors authorized the issuance of 100,000 shares of Trans common stock to Arthur A. Desilets (Ex. 40B). These shares were represented by certificates numbered A19557 through A19576.

33. Apparently, the issuance of this stock was merely one of many frauds committed by Burkinshaw's group while it was in control of Trans.

34. It appears that Desilets was an acquaintance and sometime business associate of Burkinshaw's (Tr. 466), who owned a company named Marmot Holdings Ltd. (Marmot).

35. By letters dated January 20, 1960 (Ex. MMMM) and February 19, 1960 (Ex. 99) Marmot requested the issuance of 1,200,000 shares of Trans stock under the terms of an agreement purportedly entered into between Trans, Marmot and one Virgil R. Chamberlain.

36. Although Marmot was ostensibly owned by Desilets (Tr. 466), he was apparently a mere front for Burkinshaw. For example, the aforementioned letter of January 20, 1960 was signed by A. C. Higgins on behalf of Marmot. Mrs. Higgins was Burkinshaw's secretary and was never employed by Marmot (Tr. 487). Furthermore, the letter was apparently typed by Mrs. Higgins and dictated by Burkinshaw himself since it bore the notation "OVB/ah."

37. The schedule accompanying the January 20, 1960 letter lists the persons to whom the 1,200,000 shares were to be issued. Of this group, only Desilets, who was to receive 200,000 shares, was in any way connected with Marmot. Curiously, Burkinshaw's secretary was to receive as many shares as Desilets.

38. Desilets' understanding of the deal was that he would receive a "nominal" amount of stock for his company and would do what he was told with respect to the other aspects of the deal (Tr. 485).

39. For some reason, the deal fell through. Not one to go away entirely empty handed, Burkinshaw executed on behalf of Trans a modification agreement dated April, 1960 which reduced to 100,000 the number of shares to be delivered to Marmot (Ex. NNNN).

40. Although this agreement was never signed by anyone but Burkinshaw, at a meeting of Trans's board of directors on April 12, 1960 the following resolution was passed:

> "RESOLVED, that the Board hereby authorizes and approves the modification agreement dated the 11th day of April, 1960 whereby there will be issued 100,000 shares of the authorized but as yet unissued shares of Transcontinental to Arthur A. Desilets, the nominee of Marmot Holdings Limited * * * ." (Ex. 40B).

41. These shares (the Desilets shares), represented by certificates A19557 through A19576, were transmitted by the transfer agent to Buchman & Buchman, who notified Fein of their receipt on April 26, 1960 (Ex. 13) and delivered them to Fein shortly thereafter (Tr. 1474).

42. The record is devoid of any indication as to what Fein did with the shares thereafter. Both on his deposition and at trial he testified that he was not even aware of the existence of the Desilets shares until mid-1966 (Tr. 832-33; Fein Deposition at 106).

43. Upon discovering the certificates for these shares, Fein made no attempt to determine where they came from but simply "assumed" that Trenton was the owner (Fein Deposition at 106).

44. Proceeding upon that assumption, in August, 1966, Fein surrendered these shares in exchange for twenty 5,000-share certificates, fourteen of which (certificates B6431 and B6392 through B6404) were issued in Fieland's name, in settlement of his claim for legal services in the state court suit discussed hereinafter, and six of which (certificates B6456 through B6458 and B6589 through B6591) were issued to Weiss (Ex. 61).

45. Trans claims ownership of the Desilets shares and asserts that Fein's possession and subsequent transfer of those shares and their successors was a conversion of the assets of the corporation (Complaint, Count 2).

46. Shortly after the Sedalia deal was closed, it was discovered that 25 per cent [illegible]e Rangely property, which had been pledged as security for Trenton's loan to Trans, had

previously been assigned by Burkinshaw to third parties (Tr. 547, 659). It was also discovered that Burkinshaw had overstated the purchase price for the Sedalia property by $65,000 and had misappropriated all but $10,000 of this difference (Tr. 645-46).

47. Upon learning of these acts, Green, who was Trenton's president, threatened to call the note and throw Trans into bankruptcy (Tr. 660, 665).

48. In order to forestall any such claim, the following steps were taken:

1) Burkinshaw and his group surrendered control of Trans;

2) Green and his law partner, Robinson, were elected to Trans's board of directors;

3) Fein resumed the presidency of the company;

4) Fein delivered to Trenton the following letter (Ex. L):

"TRANSCONTINENTAL OIL CORPORATION
P.O. Box 487, Rangeley, Colorado.

August 13, 1960.

Mr. Bernard L. Green
Trenton Products Company
Broad Street Bank Bldg.
Trenton, N.J.

Dear Mr. Green:

The following summarizes our understanding on the situation involving the default on the loan of $242,000 by us from Trenton Products.

1. Trenton Products has failed to receive the security provided for in the loan agreement. The prior management of this company fraudulently transferred such assets to others in violation thereof.

2. Trenton Products will support the management of this company in any litigation to secure the return of such assets. If successful therein, such assets will be transferred to Trenton Products to further secure its loan.

3. Pending the conclusion of this matter in a manner satisfactory to you, Trenton Products shall have no obligation whatsoever in relation to support of the Sedalia Gas property until the gas therein shall be connected to a gathering system and be sold. Thereafter, Trenton's share of such gas shall be charged with the operating costs applicable to its interest.

4. Trenton Products shall be entitled to receive from us, such additional shares of our company as we are able to recover from the former management and control of the company, together with such shares as may be held in the Treasury of the company, as partial recoupment of the damages sustained by you arising out of the failure of this company to perform its obligations, and without further obligation. While it is recognized that such shares have no value at this time due to the condition of the company, it is hoped that forbearance by you may result in this company being restored to viable condition in the immediate future.

5. We concede the insolvency of this company at this time. Nevertheless, it is our understanding that so long as we co-operate with you, that you will forego any effort to collect the $242,000. owed to you at this time with interest, and that you will co-operate in an effort to keep this company alive.

Very truly yours,

TRANSCONTINENTAL OIL CORPORATION

By:
Bernard Fein, President"

BF:C

5) Fein personally repaid a substantial sum of money to those Trenton investors who no longer wished to continue their investment.

49. While Burkinshaw's group was still in control of Trans, Fein engaged Harold Putterman, an accountant, to go to Calgary, Canada, where Burkinshaw had relocated Trans's offices, and examine the company's books and records (Tr. 546).

50. During the course of his investigation, Putterman discovered that the $55,000 in United States treasury notes owned by Trans had been embezzled (Tr. 546).

51. As partial restitution, Anglo issued a note to Trans for $39,043.50 (Ex. YYY). The note was secured by 500,000 shares of the Trans stock which had been acquired by Anglo in the Rangely deal (Ex. 16, 18, 19, YYY; Tr. 556-58). Specifically, certificates A19616 through A19618, A19622 and A19623, each for 100,000 shares, were pledged as security (the Collateral Security shares).

52. Anglo defaulted on the note and the security was sold to Trenton on March 20, 1961 at a private, unadvertised sale attended only by Fein and Green (Tr 1007-1008).

53. The 500,000 shares were sold for $10,000 (2 cents per share) despite the fact that Trans had the option of keeping the shares rather than selling them (Ex. 118).

54. Trans challenges not only the circumstances under which the sale was held but the reasonableness of the amount paid for the stock (Complaint, Count 1).

55. It is undisputed that Trenton subsequently surrendered these shares in exchange for certificates B6245 (derived from A19622) for 100,000 shares, and B5962 (derived from A19616 through A19618 and A19623 totalling 400,000 shares, together with A19624 for 100,000 shares which was obtained by Trenton in a different transaction) for 500,000 shares (Ex. 61; Defendants' Brief on the Counterclaims at 11).

56. On August 17, 1960, Anglo transmitted to Trans's attorneys, for delivery to Trans, the remainder of the 1,000,000 shares it had received in the Rangely deal (Ex. 17). These shares (the August 17, 1960 shares) were represented by certificates numbered A20327 (derived from certificates A19619 and A19626) for 150,000 shares (Tr. 170-71, 178-80), A19621 for 100,000 shares and A19624 for 100,000 shares (Ex. 17).

57. Of these 350,000 shares, 50,000 (one-half of the shares represented by certificate A19621) were delivered directly from Buchman & Buchman to Trans; 50,000 (the other half of the shares represented by certificate A19621) were delivered directly from Buchman & Buchman to Sackett in conjunction with the settlement of a lawsuit to be described below, and 250,000 (certificates A20327 and A19624) were delivered to Fein.

58. With respect to the 250,000 shares delivered to Fein, certificate A19624 for 100,000 shares was incorporated into certificate B5962, which was delivered to Sackett in settlement of the lawsuit hereinafter described, and certificate A20327 for 150,000 shares was surrendered in exchange for certificates B6571 through B6598 (140,000 shares) issued to Herzfeld & Stein and certificates B6599 and B6600 (10,000 shares) transferred to Loeb, Rhoades & Co. (Defendant's Post-Trial Brief on its Counterclaims at 11; Ex. 7, 61, 67).

59. Trans contends that the August 17, 1960 shares were its property, and that when Fein obtained possession of the shares and subsequently transferred them to third parties, he converted that property (Complaint, Count 1).

60. At approximately the same time Burkinshaw was removed from office (October, 1960), income from Trans's sole revenue-producing property, the Rangely fields, was withheld

as the result of litigation pending against Trans in Colorado. On October 13, 1961, an order was entered in the District Court of Colorado appointing a Receiver of the income from the Rangely property. The receivership continued until December 14, 1964, when the Court entered an order discharging the Receiver and dismissing the action (S.F.#8). During this entire period, Trans was without income (Tr. 570).

61. As a result of Trans's failure to pay its bills, its stock transfer agent, the Texas Bank & Trust Company, ceased performing services for Trans and refused to relinquish the company's records. Fein, and his secretary Theresa Zappley, were appointed by the board of directors to act as tr[illegible]er agents for the transfer of all certificates of Trans stock.

62. It is undisputed that during this period Trenton and Fein lent substantial sums of money to Trans to help pay, among other things, the rentals on the Sedalia leases.

63. With respect to these leases, although Trenton owned a two-eighths beneficial working interest in the Sedalia property, Trans paid all the lease rental fees thereon. Trans claims that Fein wasted the assets of the corporation by failing to require contribution by Trenton (Complaint, Count 7).

64. Trans ultimately ceased paying Crown rentals on ten of the thirteen leases and leases numbered 95475 through

95481 were cancelled on May 24, 1962 and leases 113620 through 113622 were cancelled on January 23, 1963 for such non-payment (S.F. #12), following written notice to Trans on November 21, 1961 threatening such cancellations. Although Fein subsequently made inquiries as to what steps should be taken to reinstate the cancelled leases, he never did so (Ex. 44).

65. Trans claims that Fein was grossly negligent in allowing the leases to expire and is thus liable to the corporation for wasting its assets (Complaint, Count 7).

66. The receivership of the Rangely property was removed in 1965 but the funds accumulated were never paid over to Trans. These funds were used to repay the loans by Fein and to reduce the $242,500 loan from Trenton to $225,460.72.

67. Notwithstanding the lifting of the receivership, Trans remained a financial disaster. As described by plaintiffs' counsel in a 1966 affidavit, the corporation was "without funds, faced with bleak financial prospects, burdened with debt" and in a "dormant and moribund state" (Ex. F).

68. Shortly after the litigation in Colorado was terminated, Sackett commenced two suits against Trans and its directors (S.F. #1).

69. In the Court of Chancery, Delaware, Sackett sought an order requiring Trans to hold an election of directors.

70. In this Court he commenced Sackett v. Transcontinental, 65 Civ. 2500 (S.D.N.Y.), charging breaches of fiduciary duty and various malfeasances and nonfeasances on the part of the named defendants which included Fein and Trenton.

71. Specifically, the complaint charged Fein with having caused the stock of Trans to be issued at nominal, unfair and inadequate consideration to third parties for his own benefit (Ex. B, paragraph [¶] 22). It was also claimed that Fein caused large quantities of the issued and outstanding stock of Trans to be purchased for his own benefit under such circumstances that the acquisition of said stock should have been for the benefit of Trans instead of for his own benefit (Ex.B, ¶23). Plaintiff demanded judgment enjoining defendants from transferring all shares unlawfully obtained by them since January 1, 1960 and cancelling such shares (Ex. B).

72. In due course, negotiations for settlement of those actions were entered into. The parties explored the possibility of Sackett's purchasing all of Trenton's and Fein's interest in Trans (Tr. 53) for $280,000 (Tr. 241, 627).

73. After several months of negotiations, the action was settled and a final judgment approving the settlement as fair and adequate was entered by Judge Tyler on July 12, 1966 (Ex. G).

74. The settlement was based upon a stipulation, specifically approved by Judge Tyler, consenting to a dismissal of the complaint,

> "with prejudice, against Trans, its successors and assigns and its stockholders, with respect to all claims or causes of action arising from, connected with or related to any of the matters or transactions alleged in the complaint * * * or which could have been asserted thereunder." (Ex. A, ¶8).

In addition, general releases, containing essentially the same language, were executed by Trans and delivered to Fein and Trenton (Ex. D, E).

75. Pursuant to the stipulation approved by the Court, the case was settled on the following terms:

1) Fein released a claim for unpaid salary amounting to approximately $60,000;

2) Fein agreed to deliver a general release executed by Fieland releasing Fieland's $35,000 claim against Trans;

3) Fein's group agreed to surrender management

of the corporation to Sackett's group;

4) Sackett agreed to effect the discontinuance of the Delaware action;

5) Fein waived any claim for legal fees or other expenses incurred in defending the lawsuit;

6) Trans agreed to deliver a general release to Fein (Ex. A).

76. In conjunction with the settlement, and expressly contingent thereon, an agreement dated June 22, 1966 was entered into between Trenton and Sackett for himself and "as nominee" for undisclosed others (Ex. I) whereby:

1) Trenton would transfer all its right, title and interest in some 650,000 shares of the common stock of Trans which it owned of record and/or beneficially, the remaining $225,460.72 of the loan Trenton had made to Trans to finance the Sedalia deal, the security therefor, and Trenton's two-eighths interest in the Sedalia property;

2) Sackett agreed to pay Trenton $187,500;

3) Trenton and Fein warranted that to the best of their actual knowledge Trans was not in default under any of the Sedalia oil and gas leases and that the issued and outstanding stock of Trans consisted of not more than 3,600,000 shares of common stock;

4) Damages for breach of the above warranties was not to attach unless the damages arising from all such breaches exceeded $10,000, in which case the total damages recoverable were to be limited to $10,000.

77. On August 12, 1966, Fein and Sackett and their respective attorneys met to close the June 22, 1966 agreement. Among other things, certificates B6245 for 100,000 shares and B5962 for 500,000 shares were delivered to Sackett by Trenton and Fein. Sackett received an additional 50,000 shares (one-half of the shares represented by certificate A19621) from Buchman & Buchman who had been holding it in escrow.

78. The following certificates, held by Trenton were not delivered to Sackett:

1) A19527 through A19556 (the Original Issue shares) for a total of 150,000 shares. Two of these certificates, A19527 and A19528, were surrendered on December 13, 1968 in connection with a reverse split of Trans stock (Ex. 61). The balance remains in Fein's hands;

2) A20083 for 50,000 shares and A20084 for 100,000 shares (derived from the Anglo-Trenton shares) (Ex. 62);

3) A19557 through A19576 for 100,000 shares (the Desilets shares);

4) The 141,000 Brown treasury shares and the 9,000 additional shares issued to replace the Original Issue shares;

5) A20327 for 150,000 shares (part of the August 17, 1960 shares).

79. It is Sackett's position that under the terms of the June 22, 1966 agreement he was to receive all the shares Trenton owned. He thus claims that any of the above shares which are not the rightful property of Trans should be delivered to him (Complaint, Count 9).

80. On October 6, 1966, counsel for Trans sent the following letter to Joseph Iacona, the vice president of Continental Stock Transfer Corporation, the transfer agent for Trans:

"Dear Mr. Iacona:

As counsel for Transcontinental Oil Corporation, and with and upon the express direction and approval of Mr. B. Edwin Sackett, president of the corporation, I instruct you to stop the further transfer on your records of any of the following certificates:

Date of Issue	Certificate Numbers	Total Number of Shares	Issued to
4-25-60	19527/56	150,000	Trenton Products Co.
8- 5-66	B6456/58	15,000	M. Arthur Weiss
8- 5-66	B6389/91	15,000	M. Arthur Weiss
8- 5-66	B6431	5,000	Louis C. Fieland
8- 5-66	B6392/404	65,000	Louis C. Fieland
8-12-66	B6571/98	140,000	Herzfeld & Stern
8-12-66	B6599/6600	10,000	Carl M. Loeb Rhodes
8-12-66	B6714/16	15,000	Herzfeld & Stern
8-12-66	B6718/21	20,000	Herzfeld & Stern
8-12-66	B6723/35	65,000	Herzfeld & Stern
8-12-66	B6736/45	50,000	Gerstley, Sunstein

At this time I can advise you that the corporate records which we have examined reveal that the afore-described stock is unregistered stock.

If it should appear that any of the stock certificates mentioned above have already been transferred, then the within "stop" instructions to you are to be applied by you to the subsequent transfers.

Please acknowledge receipt of this letter on the enclosed copy thereof.

Very truly yours,

Irwin M. Taylor "

(Ex. 95)

81. The above stop order stemmed from Sackett's belief that the shares he discovered Trenton still held after the August 12, 1966 closing were either converted from Trans or should have been delivered to Sackett pursuant to the June 22, 1966 agreement (Tr. 192-93).

82. Although the stop order was applied to all shares held by Trenton or transferred by Trenton to third parties (e.g., Fieland, Weiss, Herzfeld & Stern), no restrictions were placed upon the transferability of the shares Sackett's group had acquired from Trenton, although under the theories propounded by plaintiffs at trial, those shares are rightfully the property of Trans.

83. The stop order was directed at four categories of certificates:

1) The 150,000 Original Issue shares represented by certificates A19527 through A19556 (Tr. 101, 146; Ex. 40B minutes of 4/12/60);

2) 100,000 shares represented by certificates B6456 through B6458, B6389 through B6391, B6431 and B6392 through B6404 (derived from the Desilets shares);

3) 150,000 shares represented by certificates B6571 through B6600 (derived from certificate A20327); and

4) 150,000 shares represented by certificates B6714 through B6716, B6718 through B6721, B6723 through B6735 and B6736 through B6745 (derived from the Anglo-Trenton shares).

84. Trenton and Fein have charged that the stop order was issued, "unlawfully and with reckless and willful disregard of the rights of Trenton and Fein" for the purpose of artificially inflating the market price of Trans stock. It is also charged that Trenton and Fein were induced to enter into the June 22, 1966 agreement by the use of misrepresentations and omissions of material fact (Counterclaims 1-3).

85. In addition to the claims and counterclaims asserted between the various plaintiffs and Trenton and Fein, Trans has charged Fieland with the conversion of certificates B6431 and B6392 through B6409 totalling 70,000 shares.

86. Fieland's involvement in this lawsuit stems from his retainer in the early 1960's to represent Trans in certain litigation then pending in the Supreme Court, New York County (Tr. 916). Following a lengthy, successful trial and extensive pretrial preparation, Fieland submitted a bill for services rendered in the sum of $35,000 (Tr. 916-19).

87. Although plaintiffs have declined to stipulate that the amount of Fieland's bill was reasonable, they have not disputed that Fieland did in fact render extensive and valuable legal services, and have not affirmatively challenged the reasonableness of his charges (Tr. 399-401).

88. Ostensibly because of a shortage of cash in the company, Fein approached Fieland and requested that he accept stock rather than cash in satisfaction of his claim (Tr. 919-20). Fieland agreed, and in August, 1966 Fein caused certificates B6431 and B6392 through B6409 to be issued in registered form to Fieland in Fieland's name.

89. In addition to the certificates, Fein delivered to Fieland a letter dated August 9, 1966 which provided:

"TRANSCONTINENTAL OIL CORPORATION hereby represents to LOUIS FIELAND that 70,000 shares of stock of Transcontinental Oil Corporation, which he has agreed to accept from others, in lieu of the sum of $35,000 owed to him by Transcontinental Oil Corporation will be free, negotiable and transferable on date of receipt by him. This warranty is made in order to induce said Louis Fieland to execute a general release to Transcontinental Oil Corporation this date." (Fieland's Ex. D)

The letter was signed by Fein as president of Trans.

90. In exchange, Fieland executed a general release in favor of Trans which the corporation has retained and never offered to return, surrender or cancel.

91. The record discloses that the certificates received by Fieland were derived from the Desilets shares (Finding 44). However, the record is absolutely devoid of proof that Fieland had any information with respect to the origin of the shares. Fieland only knew that coming "from others" the certificates did not represent original issue shares.

CONCLUSIONS OF LAW

Count 1 -- the alleged conversion of Trans stock

Count One charges that,

> "On or about the 17th day of August, 1960, Anglo * * * deliver[ed] to TRANS 300,000 shares of the 1,000,000 shares theretofore delivered by TRANS to Anglo * * * [and thereafter] TRENTON and FEIN appropriated the said 300,000 shares of TRANS stock to their own uses and purposes." (Complaint, ¶12, 13).

At trial, plaintiffs accused defendants of converting far in excess of 300,000 shares. Numerous transactions, involving a total of 900,000 shares, were attacked.

In addition to denying any wrongdoing, Trenton and Fein assert that any cause of action which may have existed in favor of plaintiffs is barred by res judicata, release and the applicable statute of limitations.

The following blocks of shares are involved:

1) The August 17, 1960 Shares (Findings 56-59) - Although this block of stock originally totalled 350,000 shares, no claim is made with respect to certificate A19621 for 100,000 shares, thus limiting plaintiffs' claim to 250,000 shares.

The record clearly indicates that these shares were transmitted by Anglo to Buchman & Buchman for delivery to Trans (Finding 57). Defendants, however, assert that these shares immediately became the property of Trenton pursuant to the letter agreement of August 13, 1960 which provides in part that Trenton shall receive whatever Trans stock is recovered by Trans from Anglo (Finding 48)

Plaintiffs repudiate the agreement as a manifestation of Fein's true loyalty to the interests of Trenton at the expense of Trans. However, with the exception of a brief reference to Fein's failure to consult counsel before signing the agreement on behalf of Trans, no attempt is made to demonstrate the unreasonableness of the agreement or the availability of alternative courses of action or to suggest any possible defenses to Trenton's claims.

The simple fact is that Trenton was a defrauded creditor who could have taken action which would probably have thrown Trans into bankruptcy. Its agreement to settle for, among other things, any stock which Trans might recover from Anglo seems eminently reasonable and even charitable. Indeed, this agreement so dissatisfied some of the Trenton shareholders that Fein felt constrained to buy them out at considerable personal expense.

I accordingly find that the letter agreement of August 13, 1960 was not the product of bad faith or even bad judgment on the part of Fein and is enforceable. Thus, the acquisition of the August 17, 1960 shares by Trenton, pursuant to the express terms of the agreement, was a legal acquisition and any claim by Trans with respect to those shares is dismissed.

2) The Collateral Security Shares (Findings 49-55). As previously discussed, these 500,000 shares (represented by certificates A19616 through A19618 and A19622 through A19623) were pledged by Anglo as collateral for a $39,943.50 note it delivered to Trans. Following Anglo's default on the note, the shares were acquired by Trenton at a private, unadvertised foreclosure sale for $10,000.

At trial, it was urged that the foreclosure sale was held under a shroud of secrecy and that the resulting transfer was for inadequate consideration and constituted a conversion of the assets of Trans. It is further argued that sound business judgment required that Trans exercise its option to acquire the shares itself rather than selling them for $10,000 (Ex.118).

Although the foreclosure sale was held under circumstances which can charitably be described as questionable, I need not reach the merits of this claim, since it is my

conclusion that any claim by Trans with respect to the Collateral Security shares is barred by res judicata.

In the landmark case of Cromwell v. County of Sac, 94 U.S. 351 (1876), the Supreme Court, in discussing the principles of res judicata and collateral estoppel, stated that a judgment in a prior suit is an absolute bar to a subsequent action if:

1) the parties in the prior action are the same as in the present one,

2) the judgment in the prior action was on the merits, and,

3) the claims or causes of action are the same as in the present one.

This rule applies not only as to every ground of recovery or defense actually presented in the prior action, but also as to every ground which might have been presented in support of or opposition to the claims. See Ruskay v. Jensen, 342 F.Supp. 264, 268 (S.D.N.Y. 1972).

The first and second requirements are clearly satisfied here. Trans, Trenton and Fein were all parties to the 1965 action. On July 12, 1966 a judgment was entered approving a settlement of that case and dismissing the complaint with prejudice as to "all claims and causes of action arising from,

connected with or related to any of the matters or transactions alleged in the complaint or which could have been asserted thereunder" (Finding 74).

Such a consent decree is a judgment on the merits and is given full res judicata effect in a subsequent suit. See Ruskay v. Jensen, supra at 269, and cases cited therein.

The only question which must now be resolved is whether the causes of action previously asserted are the same as those upon which Trans relies in this action. Plaintiff argues that the wrongs for which Trans sought relief in the prior action differ from those for which redress is sought here. I cannot agree.

Although the Court is handicapped by the fact that some of the claims asserted at trial were never specifically alleged in the complaint, a comparison of the pertinent allegations in the prior action with plaintiffs' claims at trial insofar as concerns the Collateral Security shares, reveals that the latter claims clearly fall within the scope of the former allegatio s.

In this case, Fein is charged with having conspired with Trenton to purchase for their own benefit and for inadequate consideration 500,000 shares of Trans stock which Trans had the right to acquire for itself. This falls squarely within the allegations of paragraph 23 of the

complaint in the 1965 action, which charges Fein with having,

> "caused to be purchased large quantities of the issued and outstanding stock of TRANS under circumstances where the acquisition of said stock should have been for the benefit of TRANS instead of for his own benefit."

In their effort to demonstrate a variance between the prior and present claims, plaintiffs apparently place principal reliance upon the fact that paragraph 22 of the prior complaint refers to "third parties," whereas Fein and Trenton are currently charged with having misappropriated the Collateral Security shares for themselves. This argument, however, misses the point, since my ruling herein is based upon paragraph 23 of the prior complaint which, as plaintiffs' own reply brief recognizes, charged Fein,

> "with having purchased issued and outstanding stock of TRANS where he should have made the purchase for the benefit of TRANS instead of for his own benefit." (Plaintiffs' Post-Trial Reply Brief at 4).

I therefore conclude that any claim Trans may have against Trenton or Fein with respect to the Collateral Security shares is barred as being identical to or at least "arising from, connected with or relating to" the matters alleged in the prior action; certainly such claims "could have been asserted" in support of the allegations in the prior action.

Finally, it should be noted that even if Trans had exercised its option and reacquired the Collateral Security shares, Trenton would have become entitled to such shares pursuant to the terms of paragraph 4 of the August 13, 1960 agreement (Finding 48). If this course had been taken, of course, Anglo's obligation on the note would have been wiped out. On the other hand, a proper foreclosure sale would leave Anglo indebted to Trans for any deficiency. If anyone was entitled to complain about the foreclosure sale, it was Anglo. But Anglo's own conduct had been so atrocious that it was not in a position to complain about anything, and it did not. Burkinshaw was obviously happy to use his acquiescence to buy himself freedom from prosecution.

3) The Original Issue Shares (Findings 19-22). Although conceding that, pursuant to an April 1, 1960 resolution of the board of directors, the Original Issue shares were validly issued to Trenton as partial consideration for its financing of the Sedalia deal, plaintiffs urged at trial that Trenton and Fei subsequently converted these shares.

Plaintiffs' position is based upon a May 27, 1960 resolution whereby the board of directors, at Green's request, authorized the issuance of the 141,000 Brown shares and 9,000 new issue shares in exchange for the Original Issue shares (Finding 24). It is argued that since there was no consideration running to Trans for the issuance to Trenton of more

than 150,000 shares, when Green opted for the Brown shares, the Original Issue shares were nunc pro tunc stripped of the consideration which had supported their issuance and thereby rendered void. I cannot agree.

In attempting to postulate a theory which would render the Original Issue shares void, plaintiffs have ignored a gap of six weeks separating the board resolutions authorizing the issuance of the Original Issue shares and the Brown shares and have treated as one what are really two separate and distinct transactions.

The Original Issue shares were issued for valid consideration and pursuant to board action (Findings 19-22). The certificates were transmitted by the Texas Bank & Transfer Company to Abraham M. Buchman, Esq., who in turn delivered them to Fein, who delivered them to Green, Trenton's president (Finding 22). This transaction is not challenged by plaintiffs.

Subsequently, Green expressed his understanding that Trenton was entitled to receive freely transferable shares rather than newly issued, unregistered stock. Obviously recognizing the validity of Green's claim, Trans's board of directors amended the earlier resolution and on May 27, 1960 authorized the issuance to Trenton of the Brown treasury shares and 9,000 newly issued shares. It was implicit that Trans was entitled to the return of the Original Issue shares

in exchange (Finding 24). The consideration for the issuance of the Brown Treasury shares was thus the surrender of the Original Issue shares, not the Sedalia Loan.

It may have been intended that the Original Issue shares would subsequently be cancelled, and Fein may have believed that they were. However, it does not follow that the shares were no longer supported by consideration.

Upon their reacquisition by Trans, the Original Issue shares became treasury stock -- i.e., issued for consideration, subsequently reacquired by the corporation and retained uncancelled. Ballentine on Corporations 614-15 (Rev. Ed.1946). In effect, all that transpired as a result of the May 27, 1960 resolution was an exchange of stock, whereby the Original Issue shares were substituted as treasury stock in place of other treasury stock -- the Brown shares -- which had been delivered to Trenton.

When Trenton subsequently became entitled to these shares pursuant to the August 13, 1960 letter agreement (Finding 48), Trans was in no worse position than if the exchange had never taken place. Trenton would have acquired the Brown shares in the same fashion if they had remained in the treasury.

In any event, assuming arguendo the validity of plaintiffs' contention, any recovery is barred by the doctrine of res judicata. The claim in the present action, as detailed

in plaintiffs' post-trial brief, is similar to that made in paragraph 22 of the complaint in the prior action, which reads in part:

> "From time to time, since on or about January 1st, 1960, FEIN has caused the stock of TRANS to be issued at nominal, unfair and inadequate consideration to third parties whose names are not presently known to plaintiff, for the benefit of said defendant. Such issuance and sale of stock have been a waste of the assets of TRANS."

Although in plaintiffs' post-trial brief, Fein is not personally charged with having caused the initial issuance of the Original Issue shares, it is claimed that his failure to effect their cancellation did result in

1) the continued existence of the Original Issue shares with no consideration to support their issuance,

2) a personal benefit to Fein, and,

3) a waste of Trans's corporate assets. See Plaintiffs' Post-Trial Main Brief at 27-30.

These three elements, lack of consideration, personal benefit and corporate waste, clearly form the basis of both the claim herein and that stated in paragraph 22 of the 1965 complaint.

In an attempt to demonstrate the inapplicability of res judicata, plaintiffs have relied upon a comparison of the

complaint in the 1965 action with the complaint in this case. With respect to the Original Issue shares, any such comparison is meaningless. The present complaint is expressly limited to 300,000 of the shares issued to Anglo in the Rangely deal. It has nothing whatsoever to do with the claim in question, which was raised for the first time at trial.

Thus the 1965 complaint can only be compared with the trial record and the arguments in the post-trial briefs. This comparison makes clear that any claim by plaintiffs against Trenton and Fein with respect to the Original Issue shares is barred by res judicata.

Count 1 is dismissed.

Count 2 -- the Desilets shares (Findings 32-45).

The second count of the complaint alleges that,

> "[o]n or about the 12th day of April 1960, and while in control of TRANS, FEIN caused TRANS to authorize the issuance of 100,000 shares of the common stock of TRANS to one, Arthur A. Desilets." (Complaint, ¶15)

Plaintiffs charge that,

> "said stock was never delivered * * * to the said Arthur A. Desilets," (Complaint, ¶16)

but was,

> "appropriated by TRENTON and FEIN to their own uses and purposes, and [was subsequently] * * * transferred by TRENTON and FEIN to divers persons, for the sole and exclusive benefit of TRENTON and FEIN, and entirely without any payment or remuneration to TRANS * * * ." (Complaint, ¶17)

Trenton and Fein argue that this count is barred by res judicata, release and the applicable statute of limitations. I do not agree.

A comparison of the complaints in the 1965 action and the case at bar reveals that the second count in this action substantially duplicates paragraph 22 of the 1965 complaint. However, at least as early as October 15, 1970, when the pre-trial order was filed, plaintiffs altered their theory of recovery.

Fein is no longer charged with any wrongful act in connection with the issuance of this stock. Instead, it is claimed that in mid-1966, upon first discovering the existence of the Desilets shares (Findings 42, 43), Fein chose to ignore the possibility that these shares belonged to the corporation and appropriated them to his own use. The facts, as established at trial, support this theory (Findings 43, 44).

The shares were issued, pursuant to an April 12, 1960 resolution of the board of directors, without any consideration

for their issuance (Findings 32-41). Under Delaware law, which is controlling in this case, any stock not issued for money paid, labor done or property received by the corporation is void. Art IX, Sec. 3, Del. C. Ann; See also 8 Del. C. § 152; In re Seminole Oil & Gas Corp., 150 A.2d 20, 31 (Del. Ct. of Ch. 1959) and cases cited therein.

It is irrelevant that Trenton and Fein were not implicated in the improper issuance of these shares. Upon finding the certificates, Fein should have inquired into their origin. He knew the corporation had been under the control of the swindler Burkinshaw for a period of time in 1959 and 1960 and had no right merely to "assume" that the stock was the property of Trenton. He obviously found it more advantageous to shut his eyes to any possible impropriety and to appropriate the stock to his own use. It was not until 1966, less than two years before the filing of this action, that Fein first exercised dominion and control over the Desilets shares and converted them (Findings 42,43).

The letter agreement of August 13, 1960 does not justify Fein's act. That agreement only applies to treasury stock and to shares recovered from Anglo. The Desilets shares do not fit into either category. Having never been in Anglo's possession or ownership, they could not possibly have been recovered from Anglo, and having been illegally issued without consideration they could never attain the status of treasury shares.

I conclude that plaintiffs have sustained their burden with respect to the Denilets shares and are entitled to recover their damages occasioned by Fein's conversion of them.

Counts 3 and 4 have been withdrawn.

Count 5 -- the Sedalia leases (Finding 64).

The fifth count of the complaint charges Fein with gross negligence in allowing ten of the thirteen leases acquired in the Sedalia deal to lapse in 1962 and 1963 for failure to pay Crown rentals (Complaint, ¶¶28-75). The proof at trial does not sustain this claim.

Plaintiffs claim that Fein's negligence was evidenced by habitually tardy payment of Crown rentals and an apparent unawareness on his part, even years after their cancellation, that the leases had lapsed.

The undisputed fact is that from 1960 until at least 1966 Trans was insolvent and apparently in its death throes. Indeed, plaintiffs' own counsel has described Trans as being,

> "without funds, faced with bleak financial prospects, burdened with debt * * * dormant and moribund * * * ." (Ex.C at 2)

Plaintiffs do not suggest how Trans could have paid the rentals. It is stipulated that the total income from Trans's sole revenue producing properties was being withheld during the entire period in question (Finding 60). Certainly, Fein did not have a duty to advance to Trans out of his own pocket the necessary funds for payment of the lease rentals.

Moreover, although plaintiffs contend that the cancellation of the leases was not a prudent business decision, the record discloses that, with one possible exception, the cancelled leases were the least desirable of all those held in the name of Trecon (Tr. 1451-52, 1456-61, 1464). Indeed, although Sackett's testimony regarding the cancellation of the wells was generally evasive, he ultimately conceded that had he been in Fein's position, he would not have handled the leases substantially differently (Tr. 1200-1204; 1209).

Plaintiffs have proven no actionable malfeasance on the part of Fein in connection with the lapse of the Sedalia leases. Count 5 is dismissed.

Count 6 was dismissed prior to trial as res judicata.

Count 7 -- the lease rentals

The seventh count of the complaint charges that in the period between April 1960 and August 12, 1966, although Trenton was the beneficial owner of a two-eighths working interest

in the Sedalia property, Fein caused Trans to pay the full lease rentals without contribution from Trenton. At the trial, the parties stipulated that Trans did in fact pay the entire lease rentals (Tr. 594). The only question remaining is whether paragraph 3 of the letter agreement of August 13, 1960 required such payment.

Plaintiffs contend that there is no language in the letter agreement that makes any reference to Trans's obligation to pay Trenton's share of the rental fees. They have apparently overlooked paragraph 3, which provides[1/]

> "The following summarizes our understanding on the situation involving the default on the loan of $242,000 by us from Trenton Products.
>
> * * *
>
> "3. Pending the conclusion of this matter in a manner satisfactory to you, Trenton Products shall have no obligation whatsoever in relation to support of the Sedalia Gas property until the gas therein shall be connected to a gathering system and be sold. Thereafter, Trenton's share of such gas shall be charged with the operating costs applicable to its interest." (Finding 48).

Paragraph 3 clearly relieved Trenton of its obligation to contribute to the "support" of the Sedalia property. Rental payments are a principal element in such "support" and clearly fall within the intent of paragraph 3.

Count 7 is dismissed.

Count 8 has been withdrawn.

Counts 9 and 10 -- jurisdiction

The ninth and tenth counts of the complaint charge Trenton and Fein with breaches of contract, warranty and various fraudulent misrepresentations in connection with the agreement of June 22, 1966 (Finding 76).

Unlike the balance of the complaint, which seeks a recovery on behalf of Trans, these two causes of action are asserted by Sackett individually "and as nominee" of the investors on whose behalf he had negotiated and entered into the June 22 agreement. Initially, the Court is confronted with defendants' contention that the diversity jurisdiction of this Court has been improperly and collusively invoked and that counts nine and ten should accordingly be dismissed for lack of subject matter jurisdiction.

It is undisputed that Counts nine and ten are asserted against Fein, a New York citizen, on behalf of a syndicate of eleven investors, all of whose members, except Sackett, are citizens of New York (Ex. 96). It is also undisputed that Sackett's personal investment equals only one-sixteenth of the total syndicate investment (Ex. 96, HHHH).

28 U.S.C. § 1359 specifically states that,

> "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

Under this mandate, a district judge must disregard the citizenship of nominal or formal parties having no real interest in the litigation and must look to the citizenship of the real parties in interest. Stonybrook Tenants' Assn. v. Alpert, 194 F.Supp. 552, 556 (D.Conn. 1961). However, where multiple parties all have a financial interest in a lawsuit, a strategic choice of parties in order to maintain diversity not considered to be collusive so long as the party chosen to bring the suit is in fact the master of the litigation. Matthies v. Seymour Manufacturing Co., 23 F.R.D. 64, 84 (D.Conn. 1958), rev'd on other grounds, 270 F.2d 365 (2d Cir.), reh. denied, 271 F.2d 740 (2d Cir. 1959), cert. denied, 361 U.S. 962 (1960); 3A Moore's Federal Practice, ¶17.05[3.1] at 160 (2d Ed. 1974).

The district court must therefore weigh the evidence before it to determine whether, in its judgment, diversity is manufactured. See Lawson v. Morgan, 352 F.Supp. 282, 284 (E.D.Pa. 1973). In making this determination, the Court should be guided by such factors as,

> "the identity of the representative and his relationship to the party represented; the scope of the representative's powers and duties;

> any special capacity or experience which the representative may possess with respect to the purpose of his appointment; whether there exists a non-diverse party, such as a parent in a suit for injuries to a child, who might more normally be expected to represent the interests involved; whether those seeking the appointment of the representative express any particular reasons for selecting an out-of-state person; and whether, apart from the appointment of an out-of-state representative, the suit is one wholly local in nature." Groh v. Brooks, 421 F.2d 589, 595 (3d Cir. 1970).

Applying these criteria, it is evident that Sackett was not improperly or collusively selected within the meaning of 28 U.S.C. § 1359. Sackett has obviously been the leader of the syndicate since its inception. It was he who negotiated and signed the June 22, 1966 agreement out of which the ninth and tenth counts arise; he is clearly the syndicate member most familiar with the matters in suit; he has a real and substantial financial interest in the outcome of the litigation; he had already become the chairman of the board of Trans prior to the commencement of this lawsuit and has continued in that capacity during all the years since. He is no mere formal party.

Finally, reference is made to Judge Palmieri's memorandum decision in this case dated July 18, 1967, wherein the Court, in denying defendants' motion to dismiss for failure to join indispensible parties, applied Rule 17(a), F.R.Civ.P., which provides in pertinent part:

> "[A] party with whom or in whose name a contract has been made for the benefit of another * * * may sue in his own name without joining with him the party for whose benefit the action is brought." (emphasis added)

In light of all these circumstances, I conclude that Sackett is a proper nominee plaintiff and that the failure to name the other syndicate members as parties plaintiff does not offend the language or the intent of 28 U.S.C. § 1359.

Count 9 -- sale of the Trenton shares (Findings 76-79)

The ninth count of the complaint alleges that on June 22, 1966 Trenton agreed to sell to Sackett all of the shares of Trans owned by it, which were allegedly represented to aggregate 650,000 shares. It is undisputed that, in fact, Trenton held additional shares which were not delivered to Sackett at the closing.

Sackett claims that any shares retained by Trenton which had been converted from Trans should be returned to Trans, that any remaining shares held by Trenton should be delivered to him under the terms of the June 22, 1966 agreement, and that damages should be awarded with respect to any shares which cannot be delivered.

Plaintiffs have failed to carry their burden of establishing that the June 22, 1966 agreement provided for the

sale of all Trenton's Trans stock, or that Trenton or Fein represented that Trenton owned only 650,000 shares of Trans stock.

Initially conceding that the June agreement is ambiguous and should have been more skillfully drawn, Sackett asserts that its clear import was to transfer Trenton's entire holdings to his syndicate. This alleged intent, which could have so easily been expressed in the agreement, was not specifically set forth. Assuming the ambiguity of the agreement, I indicated at the trial that I would receive parol evidence as to the intention of the parties, and suggested that Messrs. Paulson and Taylor, the two attorneys who negotiated the agreement, take the stand (Tr. 765-66). This invitation was not accepted by either party.

Mr. Taylor, in his post-trial briefs, repeatedly adverts to defendants' failure to call Mr. Paulson, whose whereabouts and availability were never made known on the record. However, Taylor, who was present in the courtroom throughout the trial, was equally reticent. He attempts to justify his own failure to take the stand by the fact that his affidavit (Ex. C), sworn to nine years ago, was admitted into evidence without objection. But that affidavit is even more ambiguous than the June 22 agreement itself.

Both the agreement and Taylor's affidavit, refer to the sale of specific assets to Sackett and to specific undertakings by Fein. Among the assets listed are 650,000 shares of Trans stock. Nowhere does either document refer to the transfer of all Trenton's shares of Trans stock, nor represent or even imply that the 650,000 shares was all that Trenton held.

Plaintiffs claim that a businessman of Sackett's acumen would have never agreed to pay $187,000 for anything less than Trenton's entire position. I cannot agree.

In exchange for $187,500 in cash, plus discontinuance of the 1965 action, Trenton and Fein gave up:

1) Trans's note to Trenton in the amount of $225,460.72, to be paid off in five years with six percent interest. This note was collateralized by a security interest in the Rangely oil properties and Sedalia gas fields (all of this to Sackett's group);

2) 650,000 shares of Trans stock (500,000 to Sackett's group and 150,000 to Trans);

3) Control of Trans (to Sackett's group); and

4) Trenton's 25 percent working interest in the Sedalia property (to Trans).

In addition, Fein:

5) Assumed Trans's $35,000 indebtedness to Fieland; and

6) Released $60,000 in salary claims against Trans (Findings 74-76).

Equally unconvincing is Sackett's contention that he was misled by Fein into believing that he was receiving all of Trenton's stock in Trans. Sackett had, for many years prior to commencing the 1965 action, taken an active interest in the affairs of Trans. In that action, he charged Fein and Trenton with specific acts of conversion and corporate waste (Findings 70, 71). The action gave him not only the opportunity but the obligation, as class representative, to conduct a thorough examination of the books and records of Trans before settling. His attempt to portray himself as uninformed and blindly trusting is at conflict with reality.

Sackett also urges that defendants fraudulently misrepresented that the 650,000 shares to be transferred were all the shares owned by Trenton. The evidence does not bear this out.

At his deposition, Sackett, although evading a direct answer, ultimately admitted that Fein never directly represented that Trenton owned only 650,000 shares of Trans (Ex. 00000, pp.557-60) when he testified:

> "Q. I am asking you a question that I believe can be answered yes or no. I want to know whether Mr. Fein ever told you that Trenton Products only owned 650,000 shares of Transcontinental? Either he said that to you on some occasion, or he never said it to you.
>
> A. At any time?
>
> Q. At any time, did he ever tell you that Trenton Products only owned 650,000 shares?
>
> A. I don't think he ever told me that at any time, as to what specifically Trenton owned."

At trial, while on direct examination, Sackett changed his testimony and for the first time asserted that,

> "[w]hen I asked Mr. Fein whether the 650,000 shares was all the shares that Trenton had that was part of this deal, he replied,'Yes, but I have some stock in my name * * * .'" (Tr. 224).

However, when confronted on cross-examination with his deposition testimony, Sackett reversed his field again and confirmed that Fein never told him that Trenton owned only 650,000 shares of Trans stock (Tr. 232-35).

It is, of course, possible that Sackett was so sure, in his own mind, that Trenton owned only 650,000 shares that he never felt it necessary to inquire. (Ex. OOOOO, pp. 555-56, 560-61), and that his attorney, Taylor, made the same erroneous assumption (Ex. OOOOO, pp.561-64). But their misimpressions, unless engendered by Trenton or Fein, could not entitle them to relief.

Paragraph 3 of the June 22, 1966 agreement lists a number of express warranties and representations given by

Trenton and Fein to Sackett. There is a conspicuous absence of any warranty that Trenton owned no more than the 650,000 shares being transferred (Ex. I).

Lewis G. Cole, Esq., the attorney who drafted the June 22, 1966 agreement (Tr. 1283, 1287), after being qualified as an expert on draftsmanship, testified that neither Mr. Taylor nor anyone else ever requested the inclusion of a warranty or representation that the 650,000 shares was all the Trans stock owned by Trenton or a provision that Sackett was to receive all the shares Trenton owned (Tr. 1287). Cole testified that,

> "[i]f the object of the transaction is to acquire all of the shares owned by a person, it would be customary to have that person represent and warrant that the shares in question were his total holdings." (Tr. 1292).

Indeed, this seems too self-evident to require expert testimony.

In sum, the parol evidence adduced at trial at most established only that Mr. Sackett and his attorney assumed that he was purchasing all Trenton's stock in Trans. It failed to establish that Trenton or Fein fraudulently induced this belief or that they had a similar understanding. The agreement must therefore be interpreted as transferring only the 650,000 shares referred to.

Count 9 is dismissed.

Count 10 -- breach of warranty (Finding 76).

The tenth count of the complaint charges breach of the June 22, 1966 agreement. Specifically, Trenton and Fein are charged with having falsely represented that Trans was still the owner of all thirteen Sedalia oil leases while in fact ten of the thirteen leases had been terminated for non-payment of the Crown rentals. It is also claimed that the defendants falsely represented that there were only 3,600,000 shares of Trans stock outstanding when in fact there were 3,977,605 shares, or a little over 10 per cent more.

The June 22, 1966 agreement specifically provides:

> "THIRD: Trenton and Fein hereby warrant and represent to Buyer [Sackett] that to the best of Fein's actual knowledge and the actual knowledge of Trenton, as obtained through Fein who is its President:
>
> * * *
>
> (d) Transcontinental is not in default under any of the [Sedalia oil] leases * * *, and all rentals payable thereunder by Transcontinental to the date hereof have been paid.
>
> * * *
>
> (h) The issued and outstanding stock of Transcontinental consists of not more than 3,600,000 shares of common stock."

Warranty (d) was clearly breached. It is undisputed that ten of the Sedalia oil leases were allowed to lapse in 1962 and 1963. Although the warranty is stated in terms of actual knowledge, I find incredible the contention that Fein

unaware that the leases were in default at the time the June 22, 1966 agreement was entered into.

The Sedalia oil and gas leases were one of the few assets of a corporation which Fein had controlled for a number of years and to which he and Trenton had lent hundreds of thousands of dollars. In fact, Trenton had advanced Trans almost $250,000 for the express purpose of acquiring the Sedalia leases, and for a number of years thereafter Fein had advanced Trans substantial sums of money to maintain them (Findings 19-21, 62). It is inconceivable that more than three years after Fein had stopped advancing money to pay the lease rentals, he did not have actual knowledge that the leases were in default.

With respect to warranty (h), clearly the total number of shares of Trans common stock as of the date of the agreement was underestimated by more than 375,000 shares (Ex. 128, Tr. 747-53). However, Sackett has been unable to prove that Fein personally, or Trenton through Fein, had actual knowledge that the number of issued and outstanding shares of Trans common stock was greater than the maximum of 3,600,000 shares he warranted. The stock records of the company had been in hopeless confusion since Texas Bank & Trust Co. had ceased to act as transfer agent and had retained the records as security for the money owed it (Finding 61).

Since the express warranties in the agreement extend only to actual knowledge, count ten is dismissed to the extent that it charges a breach of warranty (h). It is sustained insofar as it charges a breach of warranty (d).

The Claim Against Fieland (Findings 85-91)

Under the terms of the June 22, 1966 agreement, Fein had assumed the obligation of obtaining a release from Fieland of Fieland's claim for attorney's fees (Finding 75). In order to secure the release, Fein caused certificates B6431 and B6392 through B6409, derived from the Desilets shares, to be issued, in registered form, in Fieland's name (Findings 44, 88). In connection therewith, Fein, as president of Trans, delivered a letter to Fieland dated August 9, 1960 which provided that the shares Fieland was receiving came "from others" and were freely transferable on the date of receipt by him (Finding 89). Although Trans does not dispute Fieland's right to be paid a fair and reasonable fee for the legal services he performed for the corporation (Tr. 399-401), it does dispute his right to retain any stock derived from the Desilets shares which Trans has proven were converted by Fein.

In support of its position, Trans places principal reliance upon the common law rule that the vendee of a thief can obtain no better title than his vendor possessed. This rule, however, is not without statutory exceptions. One such

exception is Section 8-301(2) of the Uniform Commercial Code (U.C.C.) which provides that a bona fide purchaser acquires a security free of any adverse claim.

In order to achieve bona fide purchaser status, one must acquire a security,

1) for value,

2) in good faith,

3) without notice of any adverse claims,

4) in bearer form or in registered form, and,

5) issued to the purchaser or endorsed to the purchaser or in blank. U.C.C. § 8-302 .

Applying the above criteria to the facts in this case, the conclusion is inescapable that Fieland is a bona fide purchaser within the meaning of Section 8-302 and is accordingly insulated from Trans's claim against him.

It is beyond dispute that the securities issued to Fieland were issued in registered form and acquired by Fieland for value. U.C.C. §§ 1-201(32), (33), (44), 8-102(1)(a),(c) . The only elements of bona fide purchaser status seriously disputed by Trans are whether Fieland took the securities in good faith, and without notice of any adverse claims.

In an attempt to demonstrate Fieland's failure to satisfy either requirement, Trans emphasizes Fieland's knowledge that the certificates he received came "from others" (Finding 89). It is argued that Fieland was thereby put on inquiry as to possible infirmities in the shares he received. I do not agree.

"Good faith" means honesty in fact in the conduct of a transaction. U.C.C. § 1-201(19). There is no indication whatsoever that Fieland acted otherwise. He was reluctantly accepting stock in an insolvent corporation as payment for extensive and valuable services he rendered. Simply because Fieland knew that he was not receiving original issue shares does not indicate his lack of good faith.

Moreover, of whom was Fieland to inquire? He received the certificates from Fein, who was not only the sole active officer of Trans but its transfer agent as well. What better assurance could Fieland have gotten than Fein's express representation that the shares "were free, negotiable and transferable on date of receipt by him"? That was precisely the warranty he had already received from Fein.

Likewise, the record is devoid of proof that Fieland had notice of adverse claims to the stock he received. U.C.C. § 8-301(2). The Uniform Commercial Code provides that in order to be charged with notice of an adverse claim a purchaser must either have actual knowledge of the claim or knowledge of such facts that his acceptance of the securities involved amounts to bad faith. U.C.C. § 8-304(3).

Neither standard is satisfied in this case and accordingly the claim against Fieland is dismissed.

The Counterclaims (Findings 80-84)

Trenton and Fein have asserted three counterclaims attacking the issuance by Trans on October 6, 1966 of a stop order preventing the sale of hundreds of thousands of Trans shares held by Trenton.

First and Second Counterclaims -- the stop order

The first and second counterclaims allege that Trans and Sackett "unlawfully and with reckless and willful disregard of the rights of Trenton and Fein" refused to permit the transfer of shares owned by Trenton. It is further charged that Sackett knew Trenton had a legal right to the shares affected, but issued the stop order nevertheless for personal benefit.

It is undisputed that on October 6, 1966, Sackett as president of Trans, indeed authorized the issuance of a stop order which has prevented the sale of any Trans stock held by Trenton since that date (Findings 80-83). It is also undisputed that a stockholder generally has the right to have the corporation in which he owns stock to transfer that stock pursuant to his instructions. U.C.C. § 8-401.

One of the instances in which the corporation has the right, and even the duty, to refuse to register a transfer is when adverse claims to the stock are asserted. See U.C.C. §§ 8-301, 8-401, 8-403, 8-404; Kanton v. United States Plastics, Inc., 248 F.Supp. 353, 362 (D.N.J. 1965). Indeed, the issuer may be held liable to the adverse claimant if it allows the transfer of a security when it has either actual notice of or sufficient information to put it on inquiry as to the adverse claim. U.C.C. §§ 8-403, 8-404.

In this case, a number of claims were made, some by Sackett and his group and some by the corporation itself. Although the claims asserted were, with a single exception, rejected, plaintiffs have failed to prove that the stop order was motivated by bad faith. Indeed, the factual and legal questions which had to be resolved before title to these shares was established were substantial and bitterly contested.

In all the cases cited by defendants as supporting their right to recovery, the impediment which initially justified refusal to transfer shares had been lifted but the defendants nevertheless continued to refuse to effect transfer. See Gasarch v. Ormand Industries, Inc., 346 F.Supp. 550 (S.D.N.Y. 1972); Rothberg v. National Banner Corp., 259 F.Supp. 414 (E.D. Pa. 1966); Kanton v. United States Plastics, Inc., supra; Riskin v. National Computer Analysts, Inc., 308 N.Y.S.2d 985 (Sup. Ct. 1970), modified, 326 N.Y.S.2d 419 (1st Dept. 1971).

In this case, the adverse claims upon which the stop order was based were not disposed of until the filing of this opinion.

Furthermore, I am convinced that the stop order was based upon Sackett's sincere belief that there had been numerous wrongs committed both upon him and the corporation. In this, he was not entirely wrong. As the record disclosed, Fein did convert 100,000 shares of Trans stock and had possession of hundreds of thousands of other shares whose origins were in such confusion that it required seven years of pre-trial discovery and a lengthy trial to unravel all the circumstances affecting their ownership.

The first and second counterclaims are dismissed.

Third Counterclaim -- Rule 10b-5

Trenton and Fein have brought the third counterclaim against Sackett and the syndicate members who are named as additional defendants charging violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder.

Trenton and Fein claim that Sackett and the additional defendants conspired to prevent them from selling Trenton's shares in order to inflate the market price of Trans stock artificially and thereby reap increased profits on their own sales. It is also alleged that Sackett and the additional

defendants induced Trenton to relinquish the 650,000 shares involved in the June 22, 1966 agreement by misstating certain material facts and failing to disclose others.

A scrutiny of the post-trial briefs and the record makes it clear that the defendants have not seriously attempted, much less succeeded, to prove any securities law violations by Sackett and/or the additional defendants.

For example, despite the claim that Sackett and the additional defendants conspired to pump up the price of Trans stock for their own benefit, the evidence reveals that only a relatively small number of shares has been sold by the syndicate members in the nine years since the stop order was issued. During that period, the total sales of all the syndicate members has averaged only 13,000 shares per year and a majority of the syndicate members has not sold a single share (Ex. BBB, CCC, DDD, EEE, FFF, HHH, SSSS, XXXX, ZZZZ, AAAAA, FFFFF, GGGGG). During the same period, Fein alone made sales of shares unaffected by the stop order averaging over 9,000 shares per year (Ex. 130). Sackett's personal sales (which were included in the above figure for total syndicate sales) have averaged less than one-third of Fein's (Ex. FFF, FFFFF).

If there was a conspiracy, it defies reason that only a minority of the conspirators have attempted to profit from it, and those members to only such a limited extent.

With respect to the purported misstatements and omissions of material fact, defendants have presented little or no proof as to their existence, much less their materiality.

The third counterclaim is dismissed.

SUMMARY

Trans is entitled to recover from Fein its damages proximately resulting from his conversion of the Desilets shares, and the syndicate is entitled to recover from Fein its damages stemming from his breach of warranty (d). The remainder of the claims asserted against Trenton, Fein and Fieland are dismissed, as are all three counterclaims interposed by Trenton and Fein.

The parties will be contacted in due course to arrange a mutually convenient date for a hearing on the issue of damages.

SO ORDERED.

WILLIAM C. CONNER

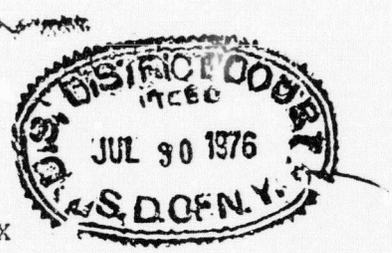
United States District Judge

Dated: New York, New York
July 31, 1975

FOOTNOTES

1. Although the letter agreement of August 13, 1960 refers only to the Sedalia gas property while the seventh count clearly encompasses Trans's payment of rentals on both natural gas and petroleum leases, the terms "gas fields" and "gas leases" have been used by all parties in reference to all thirteen natural gas leases and petroleum and natural gas leases on the Sedalia properties (Finding 19; S.F. #10; Complaint ¶39; Plaintiffs' Post-Trial Main Brief at 39, 44).

Opinion and Order of
Hon. William C. Conner, D.J.
dated July 29, 1976



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

TRANSCONTINENTAL OIL CORPORATION, TRECON OIL CO. LTD. and B. EDWIN SACKETT, individually and as nominee,

Plaintiffs,

- against -

TRENTON PRODUCTS COMPANY, BERNARD FEIN, HERZFELD & STERN, LOEB, RHOADES & CO., GERSTLEY, SUNSTEIN & COMPANY, A. ARTHUR WEISS, LOUIS C. FIELAND and THERESA ZAPPLEY,

Defendants.

67 Civ. 559 (WCC)

OPINION

- -

TRENTON PRODUCTS COMPANY and BERNARD FEIN,

Defendants and Third-Party Plaintiffs,

- against -

PHILLIP P. GOODKIN, LOUIS GOODKIN, MICHAEL A. ROBERTS, DAVID FRANKEL, JAMES E. DAVIS, PAUL A. ROSSBOROUGH, J. STREICHER & COMPANY, HARRY B. LESLIE, BERTRAM F. FAGENSON, EDWIN B. SACKETT and FAGENSON AND FRANKEL COMPANY, INCORPORATED,

Additional Defendants on Counterclaim.

- X

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CONNER, D. J.:

In what is hopefully the final chapter of this complex and protracted litigation, the Court is presently called upon to determine the quantum of damages suffered by plaintiff Transcontinental Oil Corporation (Trans) by reason of the conversion in 1966 by defendant Bernard Fein (Fein) of 100,000 shares of Trans common stock originally issued in the name of Arthur A. Desilets (the Desilets shares). The complicated factual background of this action, including the rationale upon which the Court held Fein liable for conversion of the Desilets shares, is traced, in detail, in an Opinion and Order dated July 31, 1975; it will be repeated only to the extent necessary to an understanding of the damages issue now before the Court.

This issue was tried without a jury on December 8, 1975, and this Opinion incorporates the Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P.

I.

Under well settled legal principles, the appropriate measure of damages for the conversion of items of fluctuating value, such as stock certificates, is the replacement value -- the highest market price -- reached within a reasonable period after the discovery of the conversion. In re Salmon Weed & Co., 53 F.2d 335, 341 (2d Cir. 1931); Hartford Accident and Indemnity v. Walston & Co., Inc., 291 N.Y.S.2d 366, 367 (Ct. App. 1968); Mayer v. Monzo, 221 N.Y. 442, 446 (Ct. App. 1917); Jones v. National Chautauqua County Bank of Jamestown, 74 N.Y.S.2d 498, 504-05 (App.Div. 1947); German v. Sneddeker, 13 N.Y.S.2d 237, 238-39 (App. Div.), aff'd, 281 N.Y. 832 (Ct. App. 1939); Wyndham, Inc. v. Wilmingham Trust Co., 59 A.2d 456, 459 (Super. Ct. Del. 1948); C. McCormick, Damages § 48, at 188-8 (1935). The purpose of this rule of damages is to allow the plaintiff a

> "reasonable time after he knows of the conversion, in order that he may have [an] opportunity to replace the securities or call upon the defendant to do so, and his loss is determined by the highest value within such reasonable time. Jones v. National Chautaugua County Bank of Jamestown, supra, at 505.

See In re Salmon Weed & Co., supra, at 341; Mayer v. Monzo, supra at 446; Burhorn v. Lockwood, 75 N.Y.S.828, 831 (App. Div. 1902)

In this case, plaintiff had notice of the conversion of the Desilets shares no later than the "early part of October"

1966. By that time, B. Edwin Sackett (Sackett), who headed Trans's new control group, had examined the company's transfer records and had discovered the transactions underlying this law suit.

The question of what constitutes a reasonable time after notice of the conversion depends upon the facts of each case. Thus,"[i]t has been held under varying circumstances that 30 days or 15 days or 60 days would be such reasonable period.". Mayer v. Monzo, supra, at 446-47 (citations omitted). See also Hall v. Bache, 256 N.Y.S. 693 (App. Div. 1932) (twelve days); Keller v. Halsey, 115 N.Y.S. 564 (App. Div. 1909) (nine days); Phillips v. Bank of Athens Trust Company, 119 N.Y.S.2d 47, 52 (Sup. Ct. 1952) (one week).

After discovering the conversion, Trans, through Sackett, contacted Fein, seeking an explanation of the suspect transactions. Discussions with Fein, culminating in a meeting at Fein's office on October 31, 1966, proved fruitless and by that date Trans must have realized that Fein would not return the stock. It is our opinion that by November 14, 1966, two weeks after the October 31 meeting and nearly six weeks after discovery of the conversion, plaintiff had ample time "to consult counsel, to employ * * * brokers and to watch the market for the purpose of determining whether it [was] advisable to purchase on a particular day or when the stock reaches a particular quotation, and to raise funds * * * to repurchase." Burhorn v. Lockwood, supra, at 831.

Plaintiffs' counsel unfortunately has put in very little proof as to the market value of Trans stock during the applicable period. For example, no expert testimony was introduced by plaintiffs. Moreover, plaintiffs belated attempt in its reply brief to rely upon ostensible sales made by Fieland and referred to in a state court complaint in evidence must fail. The record is clear that the complaint was introduced into evidence not as proof of the facts asserted therein, but merely to impeach a different aspect of Mr. Fieland's testimony at trial. Although these trades may have been the very best evidence of the market value of the Desilets shares, plaintiff's counsel, Mr. Taylor, inexplicably failed to adduce any evidence, either testamentary or documentary, tending to prove the existence of these transactions. Any reliance upon them would therefore be without foundation in the record.

The "proof" that was offered by Trans on the issue of damages is as follows:

1. During 1968 Trans effected private placements of 150,000 shares of treasury stock at fifty cents per share.

2. During 1967 and thereafter, when filing his answer and counterclaims, Fein placed a value of seventy cents per share on Trans stock.

3. In mid-August 1966, Fein delivered to Fieland 70,000 shares of Trans stock "in lieu of" a $35,000 attorney's fee owed to Fieland.

4. The "bid" and "asked" prices for Trans stock, as reported by the National Quotation Bureau.

With respect to the first and second proposed bases upon which plaintiff urges this Court to rest an award of damages, it is enough to note that the prices attributed to Trans stock in 1967 and 1968 are too remote in time to serve as a proper gauge in this case. Not only do those events fall outside the six-week applicable period adopted by the Court, they post-date even the sixty-day period suggested by plaintiff.

As to the Fieland transaction, although relevant in another context, it does not provide persuasive proof of the fair market value of Trans stock.

Fieland's involvement with Trans dates back to the early 1960's. At that time, Fieland was retained to represent Trans in a pending state court litigation. Following a lengthy, successful trial in 1964, Fieland submitted a bill for services rendered in the amount of $35,000. The reasonableness of that charge has never been challenged.

As part of the settlement of an earlier litigation with Trans, Fein agreed to secure a release of this claim. Thereafter, claiming "a shortage of cash in the company" (Transcript [Tr.]920), Fein asked Fieland to accept 70,000 shares of Trans stock "in lieu of" the $35,000. Although he had no first-hand information about the financial condition of the company (Tr.931-33) and although he believed the market value of the stock to be "less than $35,000" (Tr.936), Fieland decided to accommodate Fein and take "a chance" (Tr.936) on the stock.

In our opinion, this was not the type of routine, arm's-length transaction upon which a court may base a finding of fair market value.

On the basis of the record now before the Court, the best evidence of the market value of Trans stock during the applicable period is the bid and asked prices for that stock as reported by the National Quotation Bureau (the NQB), a standard reference used by dealers in securities to determine the prices quoted, on a given date, by dealers who are "making the market" in a particular stock. In fact, during the applicable period, the NQB provided the only record of bid and asked prices for over-the-counter stock.

Concededly, these quotations do not represent actual transactions, nor do they include retail markup, markdown or

commission. However, they do represent a willingness -- indeed, a commitment to the extent of 100 shares -- on the part of the listed market makers to entertain contractual bids and offerings at or around the stated prices.

During the applicable period, eleven market makers in Trans stock reported "bid" prices ranging from thirty-five to forty-three cents per share and "asked" prices ranging from forty to forty-four cents per share.[1/] Applying the so-called "highest market value" rule outlined above, in the absence of any persuasive contrary proof of market value, ... I find that the replacement value of the converted stock was forty-four cents per share. Incidentally, I have not attempted to determine the premium, if any, which Trans might have had to pay for the acquisition of such a large block of stock in a rather "thin" market, because there was no evidence thereon, and because Trans could have spaced its purchases to minimize their effect on the market price, there being no apparent reason for haste in replacing treasury shares which had been improperly issued years before.

II.

In addition, Trans may recover the amount of any proceeds received by Fein upon his sale of the Desilets stock to the extent such proceeds exceed forty-four cents per share. Frey v. Frankel, 443 F.2d 1240, 1243 (10th Cir. 1971); Gerdes

v. Reynolds, 30 N.Y.S.2d 755, 763 (1941), 89 C.J.S. Trover & Conversion § 191, at 654-55. See Jones v. National Chautauqua County Bank of Jamestown, supra, at 504.

In this context, we refer back to the Fieland transaction.

The undisputed evidence at trial established that Fieland's $35,000 fee was reasonable, indeed modest, in light of the services he had performed for Trans (Tr. 916-19). Under an agreement with Trans, Fein was obligated to satisfy that debt. We find no significant evidence in the record which would indicate that Fieland was discounting his claim when he accepted the 70,000 Trans shares. If such was the case, the burden was upon Fein to establish what amount properly should be attributed to the Fieland transaction. Cf. Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406 (1940); Callaghan v. Myers, 128 U.S. 617, 666 (1888); Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 48 (1939), aff'd, 309 U.S. 390 (1940); Szekely v. Eagle Lion Films, Inc., 140 F. Supp. 843, 850 (S.D.N.Y. 1956), aff'd, 242 F.2d 266 (2d Cir. 1957).

Thus, Fein used the converted stock (the stock transferred to Fieland was derived from the Desilets shares) to buy off a $35,000 claim against which he had no apparent defense. Trans is entitled to recover that amount from Fein.

The damages are thus computed at the rate of 44 cents per share for 30,000 shares, or a total of $13,200, plus $35,000 for the 70,000 shares given to Fieland in settlement of his claim, for a grand total of $48,200. Trans shall have judgment in that amount plus interest thereon at the rate of six per-cent per annum computed on the $35,000 from August 9, 1966, on or about which date the transfer to Fieland was executed, and on the $13,200 from November 14, 1966, the final date of the applicable "reasonable" period for re-purchase. Cf. Gerdes v. Reynolds, supra.

Submit judgment order on notice.

WILLIAM C. CONNER
United States District Judge

Dated: New York, New Yor
July 29, 1976

FOOTNOTES

1.

Market Maker	Date Year 1966	Bid	Asked
J. Streicher & Co., N.Y.	10/5	43	
A.T. Brod & Co., N.Y.	10/31	36	40
Carr Sers. Corp., N.Y.	10/31	35	40
James Anthony & Co., N.Y.	10/31	36	40
J. L. Schiffman & Co., J. Cy.	10/31	35	40
E. E. Smith Co., J. Cy.	10/31	36	41
Morris Stein Co., N.Y.	10/31		44
	11/9		44
Robert M. Tanney, J. Cy.	10/31	35	40
M. S. Wien & Co., Inc., J. Cy.	10/31	35	40
J. W. Sparks & Co., N.Y.	11/7	40	
Purcell Graham & Co., N.Y.	11/11	38	

Order and Judgment of
Hon. William C. Conner, D.J.,
dated August 26, 1976

U.S. DISTRICT COURT
FILED
AUG 30 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRANSCONTINENTAL OIL CORPORATION, TRECON OIL CO. LTD. and B. EDWIN SACKETT, individually and as nominee,

Plaintiffs,

-against-

TRENTON PRODUCTS COMPANY, BERNARD FEIN, HERSFELD & STERN, LOEB, RHOADES & CO., GERSTLEY, SUNSTEIN & COMPANY, A. ARTHUR WEISS, LOUIS C. TIBLAND and THERESA ZAPPLEY,

Defendants.

67 Civ. 559 (WCC)

ORDER AND JUDGMENT

76,795

TRENTON PRODUCTS COMPANY and BERNARD FEIN,

Defendants and Third-Party Plaintiffs,

-against-

PHILLIP P. GOODKIN, LOUIS GOODKIN, MICHAEL A. ROBERTS, DAVID FRANKEL, JAMES E. DAVIS, PAUL A. ROSSBOROUGH, J. STRETCHER & COMPANY, HARRY B. LESLIE, BERTRAM F. FAGENSON, EDWIN B. SACKETT and FAGENSON AND FRANKEL COMPANY, INCORPORATED,

Additional Defendants on Counterclaim.

This action having come on for trial before the Court, Honorable William C. Conner, District Judge, on the issue of liability under the first, second, fifth, seventh, ninth and tenth counts of the complaint during September and October, 1974

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and on the issue of damages on the second count of the complaint on December 8, 1975, and defendants Herzfeld & Stern, Loeb, Rhoades & Co., Gerstley, Sunstein & Company, A. Arthur Weiss and Theresa Zappley not having been served, and the third, fourth, eighth and tenth counts having been withdrawn by plaintiffs prior to or at the trial and the sixth count having been dismissed by the Court prior to the commencement of the trial, and the issues having been fully tried with respect to the first, second, fifth, seventh and ninth counts and with respect to the three counterclaims of defendants Trenton Products Company and Bernard Fein, and decisions dated July 31, 1975 and July 29, 1976 having been duly rendered; it is

ORDERED AND ADJUDGED, that the first, fifth, sixth, seventh and ninth counts of the complaint are dismissed with prejudice; and it is

ORDERED AND ADJUDGED that the third, fourth, eighth and tenth counts of the complaint are withdrawn with prejudice; and it is

ORDERED AND ADJUDGED that the claims alleged against defendant Feiland are dismissed with prejudice; and it is

ORDERED AND ADJUDGED, that plaintiff Transcontinental Oil Corporation have judgment in its favor upon the second count and that said plaintiff recover of defendant Bernard Fein the sum of $48,200.00, together with interest thereon at the rate of 6% per annum on $35,000.00 thereof from August 9, 1966 and on $13,200.00 thereof from November 14, 1966; and it is

ORDERED AND ADJUDGED that plaintiff Transcontinental Oil Corporation and J. Edwin Sackett are directed to remove all restrictions on transfers of Transcontinental Oil Corporation

stock certificate numbers A 19527 to A 19556, B 6456 to B 6458, B 6389 to B 6391, B 6431, B 6392 to B 6404, B 6571 to B 6598, B 6599 to B 6600, B 6714 to B 6716, B 6718 to B 6721, B 6723 to B 6735 and B 6736 to B 6745 and all other stock certificates issued in lieu thereof; and it is

ORDERED AND ADJUDGED, that the counterclaims herein of the defendants Trenton Products Company and Bernard Fein be and the same are hereby dismissed with prejudice; and it it

ORDERED AND ADJUDGED, that all parties shall bear their own costs except the defendant Fleischmann which is hereby awarded costs against the plaintiff Transcontinental Oil Corporation.

DATED: New York, N. Y.
This 26 day of August, 1976.

William C. Conner

U.S.D.J.

Service of three (3) copies of the within
is hereby admitted this 6 day of
Dec 19X.

Kaufman Taylor Kimball & Miller

Attorney for